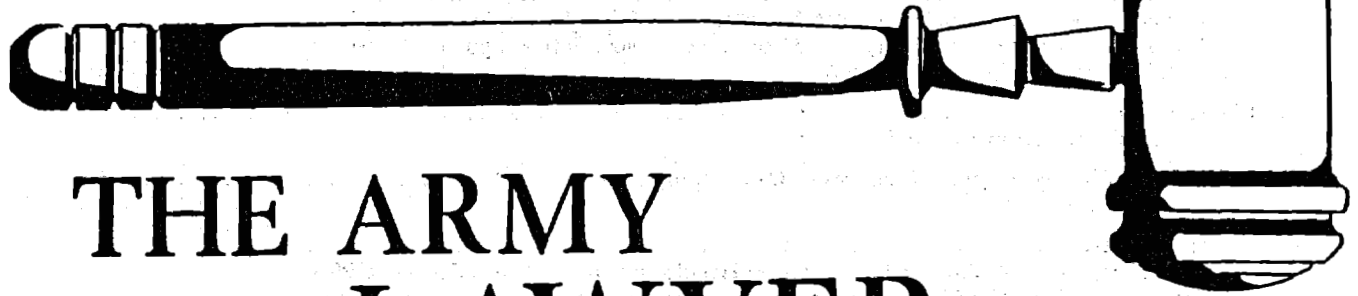


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THE ARMY LAWYER

Headquarters, Department of the Army

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October 1988

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The Army Lawyer (ISSN 0364-1287)

Editor

Captain Matthew E. Winter

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The Army Lawyer welcomes articles on topics of interest to military lawyers. Articles should be typed double-spaced and submitted to: Editor, *The Army Lawyer*, The Judge Advocate General's School, U.S. Army, Charlottesville, Virginia 22903-1781. Footnotes, if included, should be typed double-spaced on a separate sheet. Articles should also be submitted on floppy disks, and should be in either Enable, WordPerfect, MultiMate,

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SECRETARY OF THE ARMY
WASHINGTON

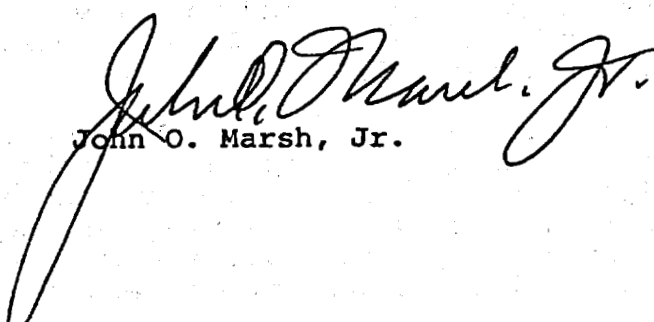
5 August 1988

MEMORANDUM FOR THE DIRECTOR OF THE ARMY STAFF

SUBJECT: Establishment of the Environmental Law
Division

I have approved the establishment of the Environmental Law Division in the Office of The Judge Advocate General, as recommended in the study submitted by the General Counsel and The Judge Advocate General.

Please take the actions necessary to ensure full resourcing of the Division, including the allocation of appropriate space, not later than October 1, 1988.


John O. Marsh, Jr.



DEPARTMENT OF THE ARMY
OFFICE OF THE JUDGE ADVOCATE GENERAL
WASHINGTON, DC 20310-2200

REPLY TO
ATTENTION OF

DAJA-CL 1988/5223(27-1a)

16 AUG 1988

MEMORANDUM FOR: STAFF JUDGE ADVOCATES AND SENIOR ATTORNEY
SUPERVISORS

SUBJECT: Participation in Civic Organizations - Policy
Memorandum 88-5

1. Civic organizations offer opportunities for military participants to enhance relationships between installations and civilian communities. Many civic organizations directly affect or indirectly influence the legal rights and obligations of soldiers, and provide a wealth of opportunity for military attorneys to further the interests of commands and soldiers. We must recognize the potential value of close ties with local civic groups, and we must take advantage of opportunities.

2. Military attorneys should avail themselves of these opportunities to foster good relations. Active participation in or close association with local bar associations and other civic groups will provide avenues for furthering cooperation and mutual understanding. For an excellent illustration of how we can become involved, see "The Virginia Military Advisory Commission - A Unique Forum for Improved Relations Between the Commonwealth of Virginia and the Armed Forces," by Colonel M. Scott Magers and Lieutenant Colonel Philip F. Koren in The Army Lawyer, September 1987.

3. Other attorneys of the installation legal office and attorneys working in tenant units should also be encouraged to participate actively in civic organizations. To this end, installation Staff Judge Advocates and supervising attorneys should establish programs which encourage attorneys to get involved in civic organizations and projects.

4. The benefits of involvement are not limited to installations within the United States. Although membership and participation in civic organizations is limited overseas, we should make every effort to maintain liaison and good relations with host nation organizations. Informal lines of communication between the legal office and the host nation legal community, for example, could be a valuable aid in performing the Army's legal mission overseas.

HUGH R. OVERHOLT
Major General, USA
The Judge Advocate General

Legitimacy and the Lawyer in Low-Intensity Conflict (LIC): Civil Affairs Legal Support

Lieutenant Colonel Rudolph C. Barnes, Jr. (USAR)

Command Judge Advocate (IMA), U.S. Army John F. Kennedy Special Warfare Center & School

Politics, Legitimacy, and Civilian Support in LIC

"Might makes right" is a phrase reflecting the primacy of overwhelming force in traditional military operations. Low intensity conflict (LIC), however, reverses traditional priorities, subordinating military force to political objectives. The ultimate political objective in LIC is political control, which requires public support for its legitimacy. "The struggle between the insurgent and the incumbent (in LIC) is over political legitimacy—who should govern and how they should govern. Accordingly, one of the principal elements in this struggle is to mobilize public support. Whoever succeeds at this will ultimately prevail."¹ The requirement that political control be legitimized by public (civilian) support gives "right" precedence over "might." The primacy of legitimacy in LIC challenges traditional military priorities, and emphasizes the operational role of the military lawyer who helps the commander ensure that military operations are "right."

In any government, the legitimacy of political authority depends upon civilian support, or at least acceptance. Unlike the peaceful political transition associated with democratic regimes, LIC is usually associated with regimes lacking effective democratic processes, including many in the Third World, where resort to violence is often an accepted means for political change. Much of the Third World is strategically important to the U.S.; political transition there can threaten U.S. security interests, especially when initiated or supported by our adversaries.

LIC could accurately be called political warfare, but that term is anathema in our society, where care has been taken to subordinate the military establishment to civilian authority and to separate politics from the military. The separation of the military from political issues is a corollary to the constitutional requirement of civilian supremacy: that is, the requirement that a civilian be commander-in-chief of all military forces.² General George Washington first honored this principle when he resigned his commission to become our first President, and it has been honored ever since, more recently during the Korean conflict when General MacArthur unsuccessfully challenged President Truman's supremacy in military matters. Thus, the political

orientation of LIC and the traditional separation of the military from political issues creates a threshold dilemma for U.S. military operations in LIC.³

Our adversaries understand our traditional reluctance to mix politics and military operations. Perhaps for that reason, they have chosen LIC as the environment in which to challenge U.S. influence in areas of strategic importance. Fortunately, Congress has recognized the need for a capability to conduct the unique military operations required in LIC. In 1986, Congress mandated the creation of the United States Special Operations Command (USSOCOM) to protect United States security interests in LIC.⁴

For USSOCOM to be successful in LIC, it must address the interrelationship of political control, legitimacy, and civilian support. This is because political control is the objective in LIC, and the legitimacy required for political control depends upon civilian support, whether for an insurgent force attempting to undermine an incumbent government, or for the incumbent government countering the insurgent force. Insurgency and counterinsurgency are opposite sides of the LIC coin, and both sides compete for the civilian support that legitimizes political control.⁵ To compete in a LIC environment, USSOCOM must prepare forces capable of winning the public support necessary for mission success in either counterinsurgency or insurgency operations.

The amount of civilian support required for legitimacy in LIC is relative to that of the opposition. Where there is widespread apathy, a small percentage of the population supporting an insurgent force can seize legitimacy from an unpopular government.⁶ Whatever the demographic situation, however, achieving legitimacy in LIC requires effective civilian support, which in turn depends upon using the least amount of military force necessary to accomplish military and political objectives.⁷

Perceptions of legitimacy do not change overnight, so that developing the necessary civilian support requires protracted commitments. While protracted over time, LIC operations require fewer military personnel and resources than do conventional operations, but military personnel involved in LIC must be specially trained to be effective. The

¹ Joint Low-Intensity Conflict Project, *Final Report* (Fort Monroe, VA, U.S. Army Training and Doctrine Command, August 1986), Volume 1, Chapter 4, p.8; cited by Michael T. Klare "The Interventionist Impulse: U.S. Military Doctrine for Low Intensity Warfare," *Low Intensity Conflict* (Pantheon Books, N.Y., N.Y., 1988) pp. 75, 76. See also Coordinating Draft, Dep't of Army, Field Manual 100-20, Military Operations on Low-Intensity Conflict, at 1-11, 2-9, 2-19 (U.S. Army Command and General Staff College, Fort Leavenworth, Kansas, Jan. 1988) [hereinafter CDFM 100-20]. The concept of legitimacy in LIC and other concepts introduced in CDFM 100-20 are further discussed in an unpublished paper prepared for the John F. Kennedy School of Government, National Security Program, at Harvard University in 1987. See Crane, Leson, Plebanek, Shemella, Smith & Williams, *Between Peace and War: Comprehending Low Intensity Conflict* 6, 28 (June 23, 1987) [hereinafter *Between Peace and War*]; see also Fishel & Cowan, *Civil-Military Operations and the War for Moral Legitimacy in Latin America*, *Mil. Rev.*, Jan. 1988, at 36.

² U.S. Const. art. II, § 2.

³ Barnes, *The Politics of LIC*, *Mil. Rev.*, Feb. 1988, at 3.

⁴ 10 U.S.C.A. § 162 (West Supp. 1988).

⁵ CDFM 100-20, at 1-10, 2-2, 2-4, 2-5; see also *Between Peace and War*, *supra* note 1, at 21.

⁶ CDFM 100-20, at 2-5.

⁷ *Id.* at 1-11, 1-17; see also *Between Peace and War*, *supra* note 1, ch. 2.

military phase of the Grenada operation was the exception to the rule; there are few quick fixes in LIC. Whether the Grenada intervention was successful depends upon the maintenance of a democratic government in that country, and that depends upon a long-term commitment.

The political objectives of LIC require that U.S. forces focus on advising and training indigenous forces, and maintain low visibility to avoid adverse political repercussions. To be effective in LIC, U.S. forces must be area oriented, language qualified, and able to function as an extension of the local U.S. embassy. Legitimacy cannot be imposed solely by intervening military forces, however superior, as the United States learned in Vietnam and the Soviet Union learned in Afghanistan.

There are two dimensions of legitimacy in LIC when the United States is involved; the supported force must be perceived as legitimate not only by the local population, but also by Congress. The War Powers Resolution gives Congress a veto over military operations involving hostilities that extend beyond sixty days, and Congress also controls the purse strings for the Department of Defense.⁸ Unfortunately, congressional support for protracted commitments in LIC has been fickle at best. Moreover, opponents of U.S. involvement in a LIC environment will undoubtedly cite the spectre of another Vietnam in an effort to undermine congressional support for U.S. commitments in LIC.

Congressional sensitivity to military operations in LIC reflects the importance of legal and moral considerations in LIC. Maintaining congressional support of military operations in LIC and mobilizing the indigenous civilian support necessary for political legitimacy in LIC require that military operations be in compliance with legal and moral standards, both essential ingredients for legitimacy.

Law and Morality in LIC

Legal and moral issues affect legitimacy in LIC from the strategic level to the tactical level.⁹ At the strategic level, the Iran-Contra Affair illustrated how the perception of illegality can affect U.S. support of an insurgency. In a similar fashion, reports of excessive use of force or human rights violations by an incumbent government can jeopardize continued U.S. support of counterinsurgency activities.

In all military operations in LIC, legal and moral issues are as important at the tactical level as they are at the strategic (policy making) level. In conventional conflict, legal and moral issues might be overlooked as long as the battle is won. In the politically sensitive environment of LIC, the presence of U.S. forces is usually controversial, so that a thoughtless violation of law or policy can turn an otherwise

successful operation into a disastrous news event, with its attendant effects on public opinion and support. LIC is an unforgiving environment that demands strict compliance with legal and moral standards.

Our commitment to the rule of law in LIC has been perceived by some as a weakness, and our adversaries have attempted to exploit our self-imposed limitations in the ambiguous warfare of LIC. Secretary of State George Shultz has described the dilemma and affirmed our commitment to the rule of law in LIC:

Our adversaries . . . hope that the legal and moral complexities of [LIC] will ensnare us in our own scruples and exploit our humane inhibitions against applying force to defend our interests. Ambiguous warfare has exposed a chink in our armor. We must use the rule of law to preserve civilized order, not to shield those who would wage war against it. When the U.S. defends its citizens abroad or helps its friends or allies defend themselves against subversion and tyranny, we are not suspending our legal and moral principles. On the contrary, we are strengthening the basis of international stability, justice and the rule of law.¹⁰

The commitment to the rule of law in LIC is evident in the Department of Army (DA) policy statement on special operations. The policy statement emphasizes that all special operations must be planned and conducted in strict compliance with U.S. law, national policy, Department of Defense directives, and Army regulations, whether in a wartime or peacetime LIC environment. The policy statement requires commanders to consult with their judge advocates during the planning of special operations and ensure that all special operations forces receive legal training commensurate with their duties and responsibilities. The Judge Advocate General of the Army must review all special operations training, doctrinal, and operational matters to ensure legal compliance.¹¹

Ensuring compliance with the laws and policies applicable to military operations falls within the evolving body of military law known as operational law, a responsibility of the staff judge advocate (SJA).¹² Beyond the requirements of law, however, there is little doctrinal guidance for the commander concerning morality. Concepts of morality are abstract and vary from one location to another.

Despite its abstract character, morality is an essential element of legitimacy in LIC that we cannot ignore. If legitimacy is the center of gravity in LIC, then victory goes to the side holding the moral high ground. Superior military force in a LIC environment cannot compensate for

⁸ The War Powers Resolution is Pub. L. No. 93-148, 87 Stat. 555 (1973). See CDFM 100-20, at A-11. Congressional control of the defense budget is mandated by U.S. Const. art. I, § 8.

⁹ CDFM 100-20, at 1-11, 2-11, 2-19, 2-31, A-9; see also Barnes, *Special Operations and the Law*, Mil. Rev., Jan. 1986, at 49; Parks, *Teaching the Law of War*, The Army Lawyer, June 1987, at 5. For a discussion of the moral issues in LIC, see O'Brien, *Special Operations in the 1980's: American Moral, Legal, Political, and Cultural Constraints*, in *Special Operations in U.S. Strategy* 76 (1984); Barnes, *Civil Affairs: A High Priority in Low Intensity Conflict* (1988) (to be published in Mil. Rev.).

¹⁰ Secretary of the State George Shultz, *Low Intensity Warfare: The Challenge of Ambiguity* (address before the Low Intensity Warfare Conference, National Defense University), reprinted as U.S. Dep't of State, Current Policy No. 738 (Jan. 15, 1986).

¹¹ Dep't of Army Policy Letter, 10 July 1986, subject: DA Policy on Special Operations. This Policy Letter has expired, but still constitutes DA policy in the special operations arena.

¹² See Graham, *Operational Law—A Concept Comes of Age*, The Army Lawyer, July 1987, at 9; see also Barnes, *Special Operations and the Law*, supra note 9. For the sake of simplicity, the term "Staff Judge Advocate (SJA)" is used throughout this article, although certain commands may have a "Command Judge Advocate (CJA)."

illegitimacy in the long run. In fact, the excessive use of force can be counterproductive in LIC. Morality is a part of the right that takes precedence over might in LIC.

The denial of legal and moral rights by an incumbent government, whether real or perceived, legitimizes an insurgency. As long as the insurgency is perceived to be a more legitimate political alternative than the incumbent government, insurgents will remain an important force. Victory in LIC depends upon a proper mix of military force and political action, and legal and political issues such as law enforcement, population control measures, individual freedom, and property rights affect legitimacy.¹³

For practical purposes, morality requires not only meeting minimal legal requirements, but also doing what is right under the circumstances. Legal restrictions on the use of force based on military necessity, the limitation of collateral damage, and proportionality may face further constraints to achieve legitimacy in LIC.¹⁴ The moral principle of humanity and the humane use of force is a constraint recognized in joint doctrine.¹⁵ In addition, local customs and traditions in the area of operations are factors to be considered.

The civil affairs advisor has the mission requirement to advise and assist the commander in fulfilling these legal and moral obligations to civilians. This mission requirement complements the operational law support provided by the SJA, with whom the civil affairs staff element must coordinate.¹⁶ Because many issues in LIC are mixed legal and political issues, however, there is no clear line of demarcation between the support requirements of the SJA and the civil affairs staff support element.

In helping the commander comply with his legal and moral duties to civilians, the SJA and civil affairs advisor are operational assets that help mobilize the public support necessary for legitimacy and mission success. In addition to advising the commander, the civil affairs advisor must serve as the commander's liaison with local civilians, requiring the civil affairs advisor to be as much a diplomat as a soldier.¹⁷

The requirement for legal and political staff support may conflict with the traditional separation of military and politics, but it is essential for success in LIC. While the concept for such civil and military staff support may seem new, the title is not; the Civil-Military Officer (CMO) or G-5 is the civil affairs staff element and is currently a part of most general staff organizations.

Because the SJA and CMO share responsibility for ensuring compliance with legal requirements and moral standards involving local civilians, these staff officers, and any civil affairs legal officers supporting them, might be

considered "legitimizers." In LIC, where legitimacy is recognized as the center of gravity,¹⁸ both the SJA and CMO have significant operational roles assisting the commander legitimize military operations.

The Staff Judge Advocate and Civil-Military Officer: Legitimizers in LIC

The Civil-Military Officer is the focal point for civilian support of military operations. As a member of the general coordinating staff group, "The CMO (G5) is the principal staff assistant to the commander in all matters concerning political, economic, and social aspects of military operations." In addition, the CMO must "advise and assist the commander in fulfilling his legal and moral obligations in accordance with international laws and agreements."¹⁹

Ideally, the CMO should be a qualified civil affairs officer, but because civil affairs is almost entirely an Army Reserve function,²⁰ there is an inadequate supply of civil affairs officers in the active component to meet mission requirements. As a result, Army Reserve civil affairs officers regularly function as the CMO for active component units whenever civil affairs expertise is needed. Reliance upon reserve civil affairs units and personnel may be appropriate for contingent conventional combat operations, as was the case in World War II. Reliance upon reserve forces for peacetime military operations in LIC, however, is misplaced. Without mobilization, reserve units are limited to training when on active duty, which precludes operational missions. While individual reservists have helped to fill the void, the need for staff integrity and continuity in active component units requires that a limited cadre of active duty civil affairs legal officers be available to serve both in CMO staff positions and as civil affairs operators.

Because of civil affairs emphasis upon legal compliance, the functions of the CMO overlap those of the SJA. Both the CMO and SJA advise the commander on sensitive legal and political issues that predominate in LIC. Even the function of the CMO as the commander's liaison with civilian authorities is similar to that of the SJA, who represents the interests of the command in legal matters. In all legal matters, however, the CMO must coordinate with the SJA, the principal legal advisor to the command.²¹

The CMO and SJA should have a close working relationship due to their overlapping responsibilities, with all command legal issues being staffed through the SJA. The CMO can offer civil affairs legal assets to strengthen the operational law capabilities of the command and meet legal support requirements, such as the acquisition of local resources, local labor, population control, or the improvement of an ineffective judiciary system. While the CMO normally has operational control of any civil affairs

¹³ CDFM 100-20, chs. 1, 2.

¹⁴ O'Brien, *supra* note 9, at 69-73.

¹⁵ Dep't of Army, Field Manual 41-10, Civil Affairs Operations, at 1-2 (17 Dec. 1985) [hereinafter FM 41-10]; see also Dep't of Army, Field Manual 41-5, Joint Manual for Civil Affairs 6, 26 (Nov. 1966).

¹⁶ FM 41-10, at 1-4, 6-10.

¹⁷ CDFM 100-20, at 1-11, 2-9.

¹⁸ See *supra* text accompanying notes 5-9.

¹⁹ FM 41-10, at 6-8, 1-2; see also Dep't of Army, Field Manual 101-5, Staff Organization and Operations, at 3-11, 3-12, 3-31, 3-32 (25 May 1984).

²⁰ Ninety-nine percent of civil affairs personnel and 36 of the 37 Army civil affairs units are in the Reserves.

²¹ FM 41-10, at 1-4, 6-10; see also Barnes, *Special Operations and the Law*, *supra* note 9.

command support elements, civil affairs legal officers should function under the professional supervision of the SJA to ensure the integrity of command legal support.

While the CMO and SJA are not identical, their similarities indicate that a civil affairs legal officer (a judge advocate officer with CA training) would make an excellent CMO. This is not to suggest that other officers could not serve equally well in the position of CMO. If there were civil affairs legal officers in the active component, however, they would seem to have more potential for serving in the position of CMO than any other identifiable group in the active component.

The Marine Corps has recognized the potential of military lawyers in civil affairs and has assigned them significant civil affairs responsibilities. A pool of civil affairs trained individuals within the Marine Corps Legal Services Support Section provides civil affairs support functions in the absence of civil affairs reserve units. The civil affairs tasks assigned to Marine Corps lawyers are not limited to legal support, but include all civil affairs command support functions.²²

The use of military lawyers for civil affairs support recognizes the close relationship between operational law support and civil affairs support. The civil affairs mission requirement to assist the commander in complying with all legal obligations and moral requirements affecting civilians could be considered an operational law requirement of the SJA as well.²³ It is helpful to think of operational law as having two major components: one component affecting military forces only (internal operational law), and another affecting civilians and noncombatants (external operational law). The former is the exclusive responsibility of the SJA, while the latter might be shared by the SJA and CMO.

Internal and external operational law issues permeate LIC. Internal issues include targeting and constraints on the use of force incorporated in rules of engagement. External issues include law enforcement, procurement issues, population control measures, and claims procedures. These may be set forth in a civil affairs agreement or civil affairs proclamation, but are more often found only in the civil affairs annex to operations plans. Too often, these internal and external operational law matters are not properly planned and coordinated by the SJA and CMO, threatening the legitimacy of military operations. The sensitive operational law issues involved in LIC require close coordination between the SJA and CMO for mission success.

The significance of legal issues to civil affairs is recognized in the current civil affairs organizational structure. In addition to the SJA, most civil affairs units have one or more civil affairs legal officers who are concerned exclusively with external operational law. The civil affairs legal officer must be able to provide operational law support through the SJA and CMO and also be able to function as a

civil affairs operator, capable of providing legal services directly to local civilians if required. To fulfill these civil affairs mission requirements, the civil affairs legal officer should have an operational law background and civil affairs training.²⁴ Few of those serving as civil affairs legal officers, however, have civil affairs training or operational law experience. This lack of training has a simple explanation: there is no training available for civil affairs lawyers other than that offered for all civil affairs officers, and there is little incentive for JAG officers to become civil affairs officers.

One reason for the lack of training and professional development opportunities available to the civil affairs lawyer may be that it is a unique function limited to the Army Reserve, effectively isolated from other judge advocate functions. There are currently sixty-three judge advocates assigned to civil affairs positions in the Army Reserve, but none in the active component. The obscurity of the civil affairs legal officer in the active Army may soon end, however, as a recent change to the modification table of organization and equipment (MTOE) of the 96th Civil Affairs Battalion authorized four civil affairs legal officers. Perhaps because the civil affairs legal support function is so little understood in the active component, however, these civil affairs legal officer positions in the 96th Civil Affairs Battalion have not yet been filled.

Filling the four vacant civil affairs legal officer positions would provide the unit commander with organic operational law support to meet civil affairs mission requirements. In this regard, the Army would do well to follow the example of the Marine Corps and assign civil affairs trained lawyers to active component civil affairs positions, beginning with these positions in the 96th Civil Affairs Battalion.

The need for civil affairs legal support in the active component has been confirmed by the unified command responsible for military operations in Latin America, the U.S. Southern Command (SOUTHCOM), in its proposal to the U.S. Army Training and Doctrine Command (TRADOC) for a civil affairs LIC company. The SOUTHCOM civil affairs LIC company provides for a civil affairs legal officer with a personal staff relationship with the company commander, rather than a separate civil affairs legal team, but the capability for civil affairs legal support is the same as in the current MTOE of the 96th Civil Affairs Battalion. The latest draft of the new "L" series TOE for Civil Affairs units has adopted the SOUTHCOM concept. When implemented, the new TOE will provide a higher grade structure for JAGC officers in Civil Affairs units than the current TOE provides for.

History also confirms the value of lawyers to civil affairs operations, especially in military government. During World War II, approximately 200 highly qualified lawyers were assigned to civil affairs and military government duties. Moreover, there were instances in which commanders

²² An unclassified message from the Commanding General of the Marine Corps Combat Developments Command, Quantico, Virginia, dated 7 April 1988, outlined the civil affairs operational concept for Marine Air-Ground Task Forces and listed all significant civil affairs tasks, including liaison with civilian agencies, procurement of local resources, population and resource control, civic action and humanitarian assistance in foreign internal defense, and other command support and civil administration functions.

²³ FM 41-10, at 1-2, 6-8; see also Barnes, *Special Operations and the Law*, *supra* note 9, at 55.

²⁴ For civil affairs legal support requirements, see generally U.S. Army Institute for Military Assistance, ST 41-10-3, U.S. Army Civil Affairs Legal Functions (Jan. 1983) (the Institute for Military Assistance is now the U.S. Army John F. Kennedy Special Warfare Center & School, Fort Bragg, North Carolina). See also Barnes, *Operational Law, Special Operations, and Reserve Support*, *The Army Lawyer*, Dec. 1984, at 6.

had their SJA perform the functions of the CMO, recognizing the similarity of the duties of the two staff functions. Based on this experience, recommendations were made after the war to assign military government legal duties to the SJA.²⁵

Only recently has the military lawyer been recognized as an operational asset, and civil affairs legal support contributed to this recognition. During and after the 1983 Grenada intervention, military lawyers from Ft. Bragg, acting as both SJA and CA legal advisors, helped commanders comply with applicable law and policy, legitimizing U.S. military operations and setting the stage for the new democratic government that followed. The contribution of military lawyers in the Grenada intervention was noted in an article that, in part, traced the role of the lawyer in civil affairs:

A number of Law of War and Civil Affairs issues were considered by judge advocates on the ground in Grenada. Some of these were handled by 82nd Airborne Division and XVIII Airborne Corps lawyers; others were considered by an expressly deployed Judge Advocate international law expert and a civil affairs officer from the JFK Center for Special Warfare. Perhaps the most significant activities of these Judge Advocate advisors were making preliminary investigations of incidents and drafting legal documents for publication by both military and civilian authority. In this regard, it is noteworthy to recall that events in Grenada were subject to severe scrutiny and publicity by media personnel. The early and proper handling of sensitive legal issues and the ability of legal advisors to consider ramifications beyond the immediate combat action, therefore, were perhaps the most important contribution they made to the operation.²⁶

Military lawyers in Grenada were involved in everything from helping to prepare an initial status of forces agreement

to settling claims by Grenadians well after combat forces had left.²⁷ Their wide-ranging responsibilities demonstrated the capability of the military lawyer to serve in a CA role and also demonstrated the importance of CA to mission success in a LIC environment. Military lawyers played a major role in legitimizing military operations in Grenada, and their contribution confirmed the importance of legal support in contemporary military operations.

Conclusion

Right takes precedence over might in low intensity conflict, an environment in which military objectives are subordinate to political objectives. The ultimate objective in LIC is political control and the civilian support required for its legitimacy. Civil Affairs is responsible for civilian support in military operations and assists the commander in ensuring that military operations are in compliance with legal and moral standards.

The SJA and civil-military officer, with the help of civil affairs legal officers, share the requirement to advise commanders of their legal and moral responsibilities to local civilians, essential ingredients for legitimacy in LIC. Because of the overlapping responsibilities of the SJA and CMO, close coordination and the staffing of all legal issues through the SJA is required.

Current mission requirements justify the creation of positions for civil affairs legal officers in the active component so they might assist the CMO and SJA in providing operational law support on matters relating to civilians. Because legal support is a major part of the civil affairs mission and the functions of the SJA and CMO are similar, civil affairs legal officers should serve in both staff positions, providing a needed capability now absent in the active component.

²⁵ Borek, *Legal Services During War*, 120 Mil. L. Rev. 19, 35-40 (1988).

²⁶ *Id.* at 47.

²⁷ *Id.* at 43-52.

Editorial Note

The following articles by Professor David Schlueter and Captain Elizabeth Wallace address the common situation in which a soldier is ordered to report to a law enforcement agency for investigatory purposes. The positions of the two authors are distinctive; both are worthy of consideration.

Professor Schlueter begins with the assumption that soldiers have an expectation in "freedom of liberty" that may be abridged only if fourth amendment safeguards are satisfied. He concludes that investigatory seizures are justified only if they are based on reasonable suspicion and are authorized by a neutral and detached magistrate. Commanders may qualify as neutral and detached magistrates if they remain "impartial" and base their authorization on a "reasonable suspicion." Professor Schlueter contends that the NCMR decision in Fagan is flawed because the commander authorized the fingerprinting of Fagan and approximately 100 other Marines without probable cause or reasonable suspicion.

*Captain Wallace presents three alternative arguments. She begins her analysis by challenging the notion that soldiers have an expectation in "freedom of liberty" in a military context. Captain Wallace takes the position that soldiers have neither an objective nor a subjective expectation in "freedom of liberty" when they are ordered to report somewhere, regardless of the purpose of the order. Accordingly, an order to report implicates no fourth amendment liberty interests. Captain Wallace's second argument is that the detention of soldiers for investigatory purposes based on reasonable suspicion is permissible under the rationale articulated in *TLO v. New Jersey*. In her third alternative argument, Captain Wallace asserts that the Fagan decision presents a fundamentally sound approach to the Dunaway dilemma. She contends that commanders serve as a constitutionally adequate*

buffer between soldiers and overzealous law enforcement agents. Implicit in her third alternative argument is the assumption that commanders will base their "investigatory detention" authorizations on "reasonable suspicion."

The Court of Military Appeals has yet to clearly define the Dunaway rule in a military context. Both articles present potential approaches to this difficult issue.

Investigative Detentions for Purposes of Fingerprinting

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Introduction

Following a series of barracks larcenies, Naval Investigative Service (NIS) investigators received permission from a Marine battalion commander to fingerprint approximately 100 servicemembers who had been present in the unit at the time of the offenses. Among those ordered to report to the NIS office for fingerprinting was the accused, who was later linked to the crime through his fingerprints. Before the accused reported to the NIS office there was no probable cause or reasonable suspicion to believe that he was in any way involved in the crimes. Were the fingerprints admissible?

The court in *United States v. Fagan*¹ held that they were. Relying on dicta in several Supreme Court decisions and the authority of a commander to act as a judicial officer, the court held that the presence of the commander negated the requirement for probable cause or reasonable suspicion. This case points out the difficult questions that face investigators, lawyers, and judges, when the issue is raised as to what procedures are required in investigative detentions for the purpose of obtaining fingerprints.

Unfortunately, aside from Supreme Court dicta and several state court decisions, there is little guidance in the area. It is not yet clear whether the guidance that does exist is even constitutional. This article addresses some of the major issues that surround investigative detentions and offers some suggested approaches to the problem.

Dunaway, Davis, and Dicta

In the typical investigative detention scenario, an individual is taken to the police station by law enforcement officers

for the purpose of interrogation, fingerprinting, production of other body evidence, or participation in an eyewitness identification. The common element in all of these activities is the fact that these sort of appearances raise fourth amendment seizure issues. Absent an individual's voluntary appearance at the police station, the government must normally demonstrate that the police had probable cause to take the suspect to their offices. For example, in *Dunaway v. New York*,² the Supreme Court held that removing a suspect to the police station for purposes of custodial interrogation constitutes a seizure of the person that must be supported by probable cause. Although the military courts have recognized the applicability of *Dunaway* to military interrogations, they have not always been consistent in application of the rule.³

There seems to be a perceptible trend toward permitting investigative detentions for some purpose even when no probable cause is present. The trend is fueled in large part by dicta in *Davis v. Mississippi*⁴ and *Hayes v. Florida*.⁵ In *Davis*, the defendant was one of 24 black youths brought to a police station for fingerprinting in connection with a rape case. The Supreme Court held that the fingerprints so obtained were the result of an illegal detention. Whether these intrusions are labelled as arrests or investigative detentions, said the Court, the fourth amendment "was meant to prevent wholesale intrusions upon personal security of our citizenry. . . ."⁶ In dicta, however, the Court indicated that because of the unique nature of fingerprinting, it was arguable that detentions for such purposes might comply with the fourth amendment even though there was no probable cause in the traditional sense.⁷ The Court noted that "fingerprinting is an inherently more reliable and effective

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¹ 24 M.J. 865 (N.M.C.M.R. 1987).

² 442 U.S. 200 (1979).

³ See *United States v. Schneider*, 14 M.J. 189 (C.M.A. 1982) (*Dunaway* is applicable to the military although the court recognized "obvious differences" between military and civilian practices; servicemember may legitimately be required to present information without probable cause in a variety of places. Court lists factors to be considered in an ad hoc approach); *United States v. Scott*, 22 M.J. 297 (C.M.A. 1986). Cf. *United States v. Thomas*, 21 M.J. 928 (A.C.M.R. 1986) (*Dunaway* not applicable where servicemember merely reports, even if involuntarily, to a location specified by a superior's order. The test is whether by means of force or show of authority, the person is subjected to significantly greater restraint upon their freedom of movement than other servicemembers); *United States v. Price*, 15 M.J. 628 (N.M.C.M.R. 1982) (*Dunaway* not applicable where accused was one of 10 individuals ordered to report to NIS office).

⁴ 394 U.S.C. 721 (1969).

⁵ 470 U.S. 811 (1985).

⁶ 394 U.S. at 726-27.

⁷ *Id.* at 727.

crime-solving tool than eyewitness identifications or confessions and is not subject to such abuses as the improper lineup and the 'third degree.'"⁸

The Court reiterated its dicta in *Davis* in the case of *Hayes v. Florida*,⁹ where the defendant had been taken from his home to the police station for purposes of fingerprinting. The Court ruled that the involuntary removal of a person from his home to the police station for purposes of fingerprinting, without prior judicial approval, required probable cause.¹⁰ Citing the familiar "stop and frisk" cases, the Court observed that there is support in those cases for the proposition that the fourth amendment would permit police to temporarily detain a person for purposes of fingerprinting: (1) if there is reasonable suspicion that the person committed an offense; (2) if there is reasonable belief that fingerprinting the individual will establish or negate his connection with the crime; and (3) if the procedure is conducted without delay.¹¹ The Court again noted that "the Fourth Amendment might permit the judiciary to authorize the seizure of a person on less than probable cause and his removal to the police station for the purpose of fingerprinting."¹² The Court, however, did not clarify what the level of justification should be, or what procedures would be considered sufficiently protective for station-house fingerprinting.

Given the repeated dicta that some basis less than probable cause might support station-house fingerprinting, it is not surprising that some states have promulgated specific procedures for obtaining judicial authorization for such investigative detentions.

State Response to the *Davis-Hayes* Dicta

In responding to the *Davis-Hayes* dicta, states have adopted a variety of procedures and standards. Colorado and Nebraska are illustrative.

Colorado has adopted a comprehensive state criminal procedural rule which provides guidelines for obtaining "nontestimonial identification" such as fingerprints, handwriting, blood, urine, and hair samples.¹³ The procedures are specifically not applicable to interrogation procedures.¹⁴ In summary, the Colorado procedures require a judicial order supported by a written affidavit setting out articulable, objective facts which provide probable cause to believe that

a crime has been committed and reasonable grounds to believe that the suspect committed the offense. In addition, the judicial order, which is only valid for 10 days, must specify the conditions of the temporary detention and must be returned to the judge with the results of the identification procedures.¹⁵ These procedures were held to be constitutional in *People v. Madson*,¹⁶ in which the court specifically noted that they were instituted in response to the suggestive dicta in *Davis*.¹⁷

In contrast to the Colorado procedures are the statutory procedures in Nebraska which require that there be a showing of probable cause before a suspect may be taken to the police station for fingerprinting.¹⁸ In *State v. Evans*,¹⁹ the Nebraska Supreme Court disagreed with those states that permitted detentions on less than probable cause. In its view, the relevant United States Supreme Court cases require probable cause to remove a person to the police station.²⁰

It is important to note that in each of these two cases, the investigation had focused on a particular individual. It would appear that the major disagreement was over the question of whether there should be a requisite showing of probable cause to believe that the particular suspect committed the offense. It is also important to note that these cases and procedures predated the Supreme Court's dicta in *Florida v. Hayes*, which specifically restated the proposition in *Davis* that some justification less than probable cause might suffice.

The Military Response: *United States v. Fagan*

The Navy-Marine Corps Court of Military Review addressed the applicability of the *Davis-Hayes* dicta in *United States v. Fagan*.²¹ In that case, NIS investigators had reason to believe that the perpetrator of a series of barracks larcenies was one of approximately 100 servicemembers. They received the battalion commander's permission to fingerprint the servicemembers at the NIS office²² and a staff officer was appointed to coordinate the process of taking them to the office in groups of 15 to 20.²³ The accused complied with the procedures only after he was told that his paycheck would be withheld until he appeared.²⁴ When the accused reported for fingerprinting, investigators noted that he had tried to scrape his fingertips but that some features of his prints matched patterns in latent prints found at

⁸ *Id.*

⁹ 470 U.S. 811 (1985).

¹⁰ *Id.* at 817-18.

¹¹ *Id.* at 816.

¹² *Id.* at 817.

¹³ Colo. R. Crim. P. 41.1 (1973). The rule is apparently modeled after Proposed Fed. R. Crim. P. 41.1 (1971) reported at 53 F.R.D. 462 (1971).

¹⁴ Colo. R. Crim. P. 41.1(h)(2).

¹⁵ Colo. R. Crim. P. 41.1(e), (f).

¹⁶ 638 P.2d 18 (Colo. 1981) (*en banc*).

¹⁷ *Id.* at 31.

¹⁸ Neb. Rev. Stat. §§ 29-3301, *et. seq.*

¹⁹ 215 Neb. 433, 338 N.W.2d 788 (1983).

²⁰ 215 Neb. at 438, 338 N.W.2d at 793. The court nonetheless found probable cause.

²¹ 24 M.J. 865 (N.M.C.M.R. 1985).

²² *Id.* at 866.

²³ *Id.*

²⁴ *Id.*

the scene.²⁵ He was advised of his rights and interrogated. Later in the same day, his hands were photographed and his fingerprints were taken.²⁶

Because the first set of fingerprints was unreadable, NIS agents approached the accused several months later at the installation hospital.²⁷ When he refused their request to supply additional fingerprints, a Hospitalman First Class ordered him to comply. When the accused refused that order, he was told by the NIS agents that they would eventually obtain his prints even if it meant arresting him. Rather than risk the embarrassment of being apprehended, he went to the NIS offices several days later and was fingerprinted without incident. His prints matched those taken from the crime scene.²⁸

In concluding that the fingerprints were admissible as the fruits of two separate and reasonable seizures of the accused, the court noted that the initial seizure of the accused occurred when he was ordered by his battalion commander to proceed to the NIS office.²⁹ The court concluded that although that seizure was not supported by probable cause or reasonable suspicion that the accused was involved in the crimes, it was nonetheless reasonable considering the balance of the government's interest and the minimum intrusiveness of the fingerprinting procedures.³⁰ The court drew heavily upon the *Davis-Hayes* dicta in concluding that the commander in this case was acting in his magisterial capacity when he ordered the mass fingerprinting. The court stated:

Although the commander in his quasi-judicial capacity did not issue a warrant for the production of fingerprint exemplars, as envisioned in *Hayes* and *Davis*, we conclude that within the military context, his presence safeguarded the appellant from oppressive governmental action and his order thereby qualifies as the functional equivalent of the "circumscribed procedure" prescribed in *Hayes* and *Davis* which warrant the seizure of persons for fingerprinting on less than probable cause. As there is no civilian counterpart for the military commander, our interpretation of the Fourth Amendment recognizes that it must be construed with the "context of military society." As such,

we believe the presence of the commander initially negated the requirement for probable cause or reasonable suspicion, where the appellant was treated properly at NIS and without fear or stigma. . . .³¹

As for the second fingerprinting session, the court relied on additional dicta in *Hayes*, which suggested that brief field detentions could be used for fingerprinting if based upon reasonable suspicion.³² Here, said the court, the NIS agents had more than a reasonable suspicion that the accused was linked with the crime when they approached him at the hospital. Because reasonable force could have been used to take his fingerprints, the court considered it proper to "threaten" him with forcible loss of his freedom if he did not cooperate and permit his prints to be taken.³³

A Response to *Fagan*: Measuring the "Circumscribed Procedures"

While analyzing investigative detention cases grounded on the *Davis-Hayes* dicta, it is important to remember that the Supreme Court apparently envisions a narrow and stingy exception to the warrant and probable cause requirements. It is also important to distinguish between investigative detentions which take place in the "field" and those which involve transporting the suspect to the offices of law enforcement personnel. With regard to "field" fingerprinting, the Court in *Hayes* envisioned a narrowly defined three-pronged requirement which includes: a reasonable suspicion that the suspect committed a crime; a reasonable basis for believing that the fingerprinting will establish or negate guilt; and a fingerprinting procedure that is "carried out with dispatch."³⁴

With regard to police station detentions for purposes of fingerprinting, the Court in *Davis* recognized that detentions for fingerprints might ". . . under narrowly defined circumstances, be found to comply with the Fourth Amendment even though there is no probable cause in the traditional sense."³⁵ In *Hayes*, the Court stated that "under circumscribed procedures, the fourth amendment might permit the judiciary to authorize the seizure of a person on less than probable cause and his removal to the police station

²⁵ *Id.* Trial testimony from a forensic pathologist indicated that the scrapes were not accidental and had apparently been made a short time before they were photographed by the NIS agents. 24 M.J. at 871.

²⁶ *Id.* at 869.

²⁷ It is not clear from the court's opinion whether the accused was at the hospital due to an illness or whether he was otherwise assigned to the hospital pursuant to his duties.

²⁸ 24 M.J. at 870.

²⁹ *Id.* at 866-67. The court concluded that the accused's freedom of movement was restrained against his will "solely for the purpose of law enforcement." *Id.*

³⁰ 24 M.J. at 867.

³¹ *Id.* at 868-69 (citations omitted).

³² 470 U.S. at 816.

³³ 24 M.J. at 871. It does not seem likely that this is the sort of conclusion that the Supreme Court had in mind in the *Hayes* dicta. Although the police may surely use reasonable force to effect an otherwise lawful seizure and investigation, it seems to stretch that case to the point where law enforcement officers may compel the suspect to appear at their office if he does not cooperate in the absence of probable cause. Here, the simple answer seems to be that when the NIS agents approached the suspect at the hospital they had probable cause to believe that he had committed the crime and therefore they could have brought him to their office without regard to whether they first asked his superior to order him to undergo additional fingerprinting.

³⁴ 470 U.S. at 817. Although the three-pronged requirement seems specific enough, as Justice Marshall pointed out in his dissent in *Hayes*, there will certainly be problems of application. For example, he noted that such field detentions would apparently be undertaken in public view—which would be a "singular intrusion" that could not be justified as necessary for the officer's safety. He also noted the difficulty of deciding how long to hold the suspect. *Id.* at 819.

³⁵ 394 U.S. at 727.

for the purpose of fingerprinting."³⁶ Although the Court did not suggest what "circumscribed procedures" would pass constitutional muster, it seems clear that the Court envisioned "judicial" authorization and supervision when the basis for seizure was premised on something less than probable cause.

Given the Court's narrow language, both for field and office detentions, the result in *Fagan* seems strained. The Court of Military Review stretched the *Davis-Hayes* dicta with regard to the basis for ordering a servicemember to report to investigative offices for the purposes of fingerprinting, and exaggerated the magisterial role of the commander in ordering such intrusions.

With regard to the permissible basis for fingerprinting detentions, the Supreme Court's dicta does not in any way suggest that, for purposes of fingerprinting, not even reasonable suspicion is required. Instead, as noted *supra*, the Court in *Hayes v. Florida* specifically envisioned that the police must have reasonable suspicion that the suspect committed a crime before taking fingerprints in the field.³⁷ It would be anomalous to require reasonable suspicion to support a "stop and frisk" detention for fingerprinting and yet conclude that neither probable cause nor reasonable suspicion would be necessary to support the removal of a suspect to the police station.

With regard to who may authorize office detentions for purposes of fingerprinting, the Supreme Court's dicta leaves no doubt that the Court would expect that the process would be approved and supervised by the judiciary. The question for military courts then is whether the commander might properly fill that role.³⁸ It seems clear that for purposes of authorizing seizures for purposes of fingerprinting, a commander may act in a quasi-judicial capacity. It seems less certain that when the commander does so, such approval negates the requirement of probable cause or reasonable suspicion. Indeed, the military law on this issue is well-settled and neither the dicta in *Hayes* and *Davis* nor military necessity calls for a new rule.³⁹ It also seems less

certain that the commander's approval negates the requirement to follow circumscribed procedures for ensuring that the suspect's rights are not unduly abrogated.

Although in *Fagan* the NIS obtained permission from the battalion commander to fingerprint the 100 servicemembers, it is not clear from the Court's opinion what, if any, articulable facts they presented to the commander. Nor is it clear to what extent the liaison officer appointed by the commander supervised the procedures.⁴⁰ What is clear, as the court recognized, is that there was neither probable cause nor reasonable suspicion supporting the commander's order that the accused report to the NIS office for fingerprinting.⁴¹

Looking for Help in the Rules of Evidence

The Military Rules of Evidence provide no specific guidance on investigative detentions, either in the field or at the police station, for purposes of fingerprinting. Rule 314(f)⁴² addresses searches incident to lawful stops but sets out no guidelines as to whether the "stop" may include other identification procedures such as fingerprinting.

Rule 312 governs body views and intrusions and might provide the basis of fingerprinting. For example, Rule 312(b) addresses "visual examination" of the body but hinges such examinations on other authorized intrusions such as a valid inspection,⁴³ a search incident to apprehension,⁴⁴ an emergency search,⁴⁵ or a probable cause search.⁴⁶ It would require a strained reading of Rule 312, however, to permit investigators to take an individual to their office for the specific purpose of fingerprinting, without some independent predicate.

Rule 316(f) may provide a vehicle for judicial adoption of the "circumscribed procedures" envisioned in the *Davis-Hayes* dicta for fingerprinting in either the field or at the police station. That rule provides:

Other seizures. A seizure of a type not otherwise included in this rule may be made when permissible

³⁶ 470 U.S. at 817. In *Davis* the Court stated:

We have no occasion in this case, however, to determine whether the requirements of the Fourth Amendment could be met by *narrowly circumscribed procedures* for obtaining, during the course of a criminal investigation, the fingerprints of individuals for whom there is no probable cause to arrest. 394 U.S. at 728 (emphasis added).

³⁷ 470 U.S. at 817.

³⁸ See Schlueter, *Military Criminal Justice: Practice and Procedure*, § 5-2(A) at 152 (2d ed. 1987); Cooke, *United States v. Ezell: Is the Commander a Magistrate? Maybe*, *The Army Lawyer*, Aug. 1979, at 9.

³⁹ Cf. Mil. R. Evid. 313(b). The commander can obviously make some fourth amendment-type intrusions for certain noninvestigative reasons without triggering the requirements of probable cause or reasonable suspicion. Although it is conceivable that an en masse fingerprinting procedure might be justified on grounds of security, fitness, or good order and discipline, if that procedure was conducted for purposes of obtaining evidence, it could not be treated as a valid inspection under Rule 313.

⁴⁰ The court indicated that the NIS agents would call the liaison officer and ask that he provide them with "15 or 20 members of the battalion at a given time and a given place" for fingerprinting. The liaison officer apparently maintained the master list of who had been fingerprinted. 24 M.J. at 866.

⁴¹ 24 M.J. at 868. The court noted, however, that the NIS agents had reasonable grounds to believe that one of the approximately 100 Marines had committed the offense and that the fingerprinting process would identify the perpetrator. *Id.*

⁴² Manual for Courts-Martial, United States, 1984, Military Rule of Evidence 314 [hereinafter Mil. R. Evid.]. Rule 314 governs searches not requiring probable cause; Rule 314(f) is a codification of *Terry v. Ohio*, 392 U.S. 1 (1968). In 1984, Rule 314(f)(3) was added to incorporate the "automobile frisk" recognized in *Michigan v. Long*, 463 U.S. 1032 (1983). See generally, S. Saltzburg, L. Schinasi, and D. Schlueter, *Military Rules of Evidence Manual* at 255-56 (2d ed. 1986). As noted *supra* the Supreme Court has stated in dicta that *Terry* stops might properly include fingerprinting. Nor is there any real help in RCM 302, which governs military apprehensions. The discussion to that rule merely notes the distinction between apprehensions and investigative detention.

⁴³ Mil. R. Evid. 313(b).

⁴⁴ Mil. R. Evid. 314(g).

⁴⁵ Mil. R. Evid. 314(i).

⁴⁶ Mil. R. Evid. 315.

under the Constitution of the United States as applied to members of the Armed Forces.

This rule, which parallels the catch-all provision in Military Rule of Evidence 314(k) for nonprobable cause searches, permits some leeway in the application of constitutionally permissible seizures which are not otherwise specifically mentioned in the Rules.⁴⁷ Seizures for the specific purpose of fingerprinting would seem to be safe candidates for this catch-all provision.

Assuming that there is room within the Rules of Evidence for judicial adoption of some narrowly defined procedures, there is the question of actually settling upon these guidelines that may be readily and constitutionally applied in a principled fashion. Given the absence of specific guidance in the Rules themselves, it would seem preferable to consider amendments to either Rule 316, 314, or 312 that would clearly set out defined procedures tailored to military practices.⁴⁸

Circumscribed Procedures: A Model

Using the *Davis-Hayes* dicta, Proposed Federal Rule of Criminal Procedure 41.1 (1971),⁴⁹ and a variety of state procedures adopted in reliance on that dicta,⁵⁰ it should not be difficult to adopt some procedures, either judicially or through formal amendments to the Rules of Evidence, for extending the "Terry stop" to fingerprinting at the scene of the stop (in Rule 314) and for removing an individual to the investigators' office for the specific purpose of obtaining fingerprints (in Rule 316). In any event, several key topics must be considered.

Characterization of the Intrusion

In addressing the issue of investigative detentions for the purposes of fingerprinting it is important to define what governmental action triggers the fourth amendment. It is

well settled that an individual normally has no reasonable expectation of privacy in his or her fingerprints.⁵¹ Thus, the process of actually taking fingerprints does not normally invoke the protections of the fourth amendment.⁵² If the suspect or accused is already subject to lawful authority pursuant to an arrest or apprehension, the additional steps of obtaining fingerprints or other identification evidence, such as voice exemplars or other superficial body evidence,⁵³ are normally permitted without additional authorization or approval.⁵⁴

If the suspect or accused is not already within the lawful custody of the police, it is necessary that some authorization or justification be articulated to support the "seizure" of the person for the purpose of obtaining fingerprints.⁵⁵ That justification may rest, as suggested in the *Davis-Hayes* dicta, on extending the "Terry stop" to include brief detentions for fingerprinting, or it may be justified by judicially supervised procedures that entail removing the individual to the police station. In either instance, the individual has been "seized" and that necessarily invokes the protections of the fourth amendment.⁵⁶ Of course, if the individual consents to the seizure, in much the same way an individual may consent to a search, then it should not be necessary to show the underlying basis or approval for the seizure.⁵⁷

Power to Authorize Investigative Detentions

For fingerprinting in the field, the Supreme Court's dicta in *Hayes* already sets out clear guidelines which authorize those making otherwise lawful "Terry stops" to fingerprint those who have been detained.⁵⁸ The same rule could be easily adapted to the military.

For detentions involving removal of the suspect to the offices of law enforcement officers, the solution again seems easily applied. Although the *Davis-Hayes* dicta envisions judicial approval, for the military that would include

⁴⁷ See S. Saltzburg, L. Schinasi, and D. Schlueter, *supra* note 42 at 302. Note that although there is no Drafters' Analysis for this particular subpart of the Rule, the "legislative" intent seems clear.

⁴⁸ *Id.* at 85 (there should be a preference for the "legislative" process which lends to interservice uniformity).

⁴⁹ The text of the proposed Rule, entitled Nontestimonial Identifications, is printed at 52 F.R.D. 409 (1971).

⁵⁰ See, e.g., Ariz. Rev. Stat. Ann. § 13-3905; Col. R. Crim. P. 41.1; Idaho Code § 19-625; and N.C. Gen. Stats. § 15A-271, et seq.

⁵¹ See, e.g., *Cupp v. Murphy*, 412 U.S. 291 (1973); *United States v. Dionisio*, 410 U.S. 1 (1973); *United States v. Hardison*, 17 M.J. 701 (N.M.C.M.R. 1983).

⁵² In any procedure implicating "body" evidence, there is always the possibility that the procedures used "shocked the conscience" or were otherwise unreasonable and thus infringed upon the suspect's due process rights. *Rochin v. California*, 342 U.S. 165 (1952). See also S. Saltzburg, L. Schinasi, and D. Schlueter, *supra* note 42 at 224. Because of the limited physical intrusion of fingerprinting, it should not be necessary to use medically trained personnel as is required in more intrusive body inspections or intrusions. See, e.g., Mil. R. Evid. 312(d), (e).

⁵³ *United States v. Mara*, 410 U.S. 19 (1973); *United States v. Repp*, 23 M.J. 589 (A.F.C.M.R. 1986) (no reasonable expectation of privacy in arms); *United States v. Hardison*, 17 M.J. 701 (N.M.C.M.R. 1983) (no expectation of privacy in appearance which would bar photographing suspect). See also *In re Grand Jury Proceedings*, 686 F.2d 135 (3d Cir. 1982) (grand jury request for hair samples did not amount to search or seizure).

⁵⁴ Different rules may apply for more intrusive procedures which are used to obtain body fluids or other evidence within the body. Mil. R. Evid. 312(d), (e). Cf. Mil. R. Evid. 313(b) (inspection may include order to provide body fluids).

⁵⁵ See, e.g., *United States v. Hardison*, 17 M.J. 701 (N.M.C.M.R. 1983) (fingerprints taken of suspect already within lawful custody of NIS agents). See also *United States v. Sechrist*, 640 F.2d 81 (7th Cir. 1981); *United States v. Sanders*, 477 F.2d 112 (5th Cir. 1973).

⁵⁶ Although the "basis" for such limited seizures may not require probable cause, the *Dunaway-Schneider* test for determining when a servicemember has been seized within the meaning of the fourth amendment should remain useful. There is a problem with application of that principle to mass seizures, such as in *Fagan* where 100 individuals were ordered to report. Technically, all of them were targets of the investigation although the record does not indicate whether any of them, besides the accused, protested. The better starting point is to conclude that all of them were seized within the meaning of the fourth amendment, as applied in the military context, and then determine whether a sufficient fourth amendment basis, also applied in the military context, supported these seizures.

The Supreme Court has distinguished subpoenas and investigative detentions, see, e.g., *United States v. Dionisio*, 410 U.S. 1 (1973), in large part because of the lack of stigma in the former procedure and because they are within the control and supervision of the court. Investigative detentions at the office of the law enforcement agent should not fall within that category unless they have been judicially approved and supervised.

⁵⁷ See, e.g., Mil. R. Evid. 314(e). Indeed, it would seem appropriate to require investigators requesting authorization to first show that the individual has not consented, or is expected not to consent.

⁵⁸ 470 U.S. at 816-17.

commanders who already are authorized to approve probable cause searches⁵⁹ and to order inspections.⁶⁰

Basis for Authorization

For field detentions, the Supreme Court's dicta in *Davis* and *Hayes* seems to articulate clearly what the Court envisions as the minimal constitutional basis for taking fingerprints. As noted, *supra*, the investigators must be prepared to show that they had a reasonable basis for believing that the fingerprinting procedures would either connect the suspect with the crime or clear him.⁶¹ Thus, it would seem that the Court envisioned something beyond a routine and carte blanche authorization to fingerprint those stopped in the field.

Perhaps the most critical issue in adopting rules and procedures for fingerprinting at the offices of the investigators is the question of whether probable cause must be shown, as is now required under *Dunaway* for custodial interrogations, or whether to follow the *Davis-Hayes* dicta and adopt some lesser standard. If a lesser standard is appropriate, what should it be? Clearly, the safest and most protective constitutional route is to require probable cause for the underlying seizure of the suspect or accused. But that may unduly bind investigators who have some articulable justification amounting to less than probable cause which would reasonably expedite criminal investigation.

Good arguments for adopting a standard less than probable cause are recognized and catalogued in the *Davis* and *Hayes* cases and need only be summarized here: the fingerprinting procedures are generally more reliable; they do not entail subjecting the suspect to the abuses such as the "third degree" or an improper line-up; they need not be conducted unexpectedly; and they are usually less intrusive than other police detentions and searches.⁶² These differences are not compelling enough, however, to justify seizures without any basis whatsoever.

The better route is to adopt a reasonable suspicion standard. That would be consistent with the minimum for field detentions. At the same time, this standard recognizes that, although there are always the inherent embarrassments, dangers, and fears most often associated with police station

appearances, intervening judicial authorization can interpose reasonable limits upon the detention in terms of its length and scope.

There is a related problem of the scope of the suspicion. Must it focus on one individual or may it focus on a larger and more generalized population? In the state cases cited *supra*, investigators had focused on a particular suspect. In contrast, the NIS investigators in *Fagan* focused on 100 servicemembers—hardly individualized suspicion. Despite the court's characterization to the contrary, that sort of massive fingerprinting appears to be a "dragnet." Absent truly extraordinary reasons, it is probably safe to say that similar procedures would normally not be tolerated in the civilian community.⁶³

There is some support in *New Jersey v. TLO*,⁶⁴ a school search case, for the proposition that in certain instances a generalized suspicion may suffice.⁶⁵ In the context of the fingerprinting, those seeking judicial approval for the fingerprinting should be prepared to show that there is reasonable suspicion to believe that an individual or identified group of individuals are implicated and that all other necessary and reasonable means of investigation have failed to identify the perpetrator. The greater the number of possible suspects, the greater should be the burden of showing necessity for the procedures, and the exhaustion of other reliable police investigative techniques. The type and severity of the offense should also be factored into the formula.⁶⁶ Investigative fingerprint detentions should never become routine to the extent that every time latent fingerprints are discovered at the scene of a crime that any and all individuals in any way remotely linked with the offense can be taken in for fingerprinting.

Although written affidavits are not required for probable cause searches,⁶⁷ good arguments can be made for requiring law enforcement officers to place their justifications for fingerprinting requests in writing, especially if the proposed procedures involve mass detentions. Similarly it would seem preferable to require the individual requesting the fingerprinting detention to be placed under oath.⁶⁸ Unlike probable cause searches which may involve an element of urgency for prompt approval and execution, fingerprinting

⁵⁹ Mil. R. Evid. 315(d).

⁶⁰ Mil. R. Evid. 313(b).

⁶¹ 470 U.S. 817.

⁶² *Davis v. Mississippi*, 394 U.S. at 727 (1969).

⁶³ *Cf. In re Fingerprinting of M.B.*, 125 N.J. Super. 115, 309 A.2d 3 (1973) (22 students fingerprinted pursuant to court order when school ring was found near homicide victim and victim's car contained fingerprints other than victim's; order included protective provision for destruction of prints at conclusion of investigation). The tolerance level no doubt rises with the severity of the crime. Whether several barracks larcenies involving stereo equipment justifies fingerprinting 100 servicemembers is open to debate. Assuming that such offenses, in the context of the time and place, are clearly and objectively viewed as serious offenses, someone other than the police should make that determination. See *Dunaway v. New York*, 442 U.S. 200, 213 (1979) (danger in permitting police to strike the balance between social and individual interests).

⁶⁴ 469 U.S. 343 (1985).

⁶⁵ *Id.* at 342, n.8. The Court stated in part:

We do not decide whether individualized suspicion is an essential element of the reasonableness standard we adopt for searches by school authorities. In other contexts, however, we have held that although "some quantum of individualized suspicion is usually a prerequisite to a constitutional search or seizure . . . the Fourth Amendment imposes no irreducible requirement of such suspicion . . . Exceptions to the requirement of individualized suspicion are generally appropriate only where the privacy interests implicated by a search are minimal and where "other safeguards" are available to "assure that the individual's reasonable expectation of privacy is not 'subject to the discretion of the official in the field.'" (Citations omitted.)

⁶⁶ See *United States v. Jennings*, 468 F.2d 111 (9th Cir. 1972) (court declined to apply *Davis* dictum when suspect was detained in order to match his prints with those found on marijuana wrappers). See also *Ariz. Rev. Stat. Ann.* § 13-3905 (police must show "reasonable belief" that felony has been committed).

⁶⁷ Mil. R. Evid. 315(f), *Drafters' Analysis*.

⁶⁸ *United States v. Stuckey*, 10 M.J. 347 (C.M.A. 1981).

generally does not and it would not seem unreasonable to impose these additional safeguards.

Scope of Authorization

The "judicial" authorization to conduct a police station investigative detention should specify the exact scope and purpose of the detention.⁶⁹ For example, the authorization could state that only fingerprints will be taken and that no interrogation is authorized unless there is a showing of probable cause.⁷⁰ If investigators desire to gather additional identification evidence such as voice prints or hair samples, the authorization should cover those points. If the investigators desire to obtain body evidence such as blood, urine, or saliva samples, they should be otherwise prepared to comply with Military Rule of Evidence 312. Finally, considering the possibility of police overreaching, and for pragmatic reasons associated with proof at trial, it would seem preferable to reduce the authorization to writing.

Execution

Like the provisions for executing search authorizations,⁷¹ any authorization to fingerprint individuals or to obtain other body evidence should include a provision for notifying the individual of the purpose of the detention.⁷² As has been adopted in at least one state, the execution of the authorization may be limited to a particular time, such as regular duty hours, and may be effective for a definite period of time.⁷³ The purpose of all of this is to reflect and

maintain those unique features of fingerprinting which distinguish that procedure from interrogation and line-up procedures.⁷⁴

Exigencies

Finally, provision should be made for the fact that in some limited situations, exigent circumstances might prevent obtaining prior authorization. Nonetheless, just as exigent circumstances will normally not warrant abrogation of the requirement for probable cause,⁷⁵ exigencies should not abrogate the requirement for reasonable suspicion. Because fingerprints are not evanescent,⁷⁶ there should be very few cases where investigators cannot obtain prior and careful review of their request to take the fingerprints.⁷⁷

Conclusion

The *Fagan* case is an unmistakable indication that a gap exists in both the Military Rules of Evidence and military case law. Given the unique issues raised by that case and the problems it demonstrates, some careful consideration should be given to developing clear and definite principles which can be readily applied by a worldwide legal system. The most logical choice is a series of amendments to the Rules of Evidence that would address not only fingerprinting, but related evidence-gathering techniques which in themselves generally will not require a further invasion of privacy but which, at the outset, require seizure of the individual. Such changes would help ensure that the administration of criminal justice in the military is not haphazard or unprincipled.

⁶⁹ See, e.g. Proposed Fed. R. Crim. P. 41.1; Colo. R. Crim. P. 41.1.

⁷⁰ For example, in *Fagan* the NIS investigators, according to the court, had probable cause when they examined the suspect's fingertips and determined that he had attempted to remove his prints. 24 M.J. at 869-70.

⁷¹ Mil. R. Evid. 315(h).

⁷² Mil. R. Evid. 315(h)(1).

⁷³ See, e.g., Colo. R. Crim. P. 41.1(f) (10 days); Proposed Fed. R. Crim. P. 41.1 (judicial order returnable within 45 days).

⁷⁴ *Davis v. Mississippi*, 394 U.S. at 727.

⁷⁵ See Mil. R. Evid. 315(g) (the exigent circumstances only relieve the requirement of the search warrant or authorization).

⁷⁶ *Davis v. Mississippi*, 394 U.S. at 727 (there is no danger of destruction of fingerprints).

⁷⁷ Despite the Court's assurance in *Davis* *supra* note 76, that fingerprints cannot be destroyed, the *Fagan* case demonstrates that suspects might attempt to remove their fingerprints and thus frustrate prompt identification.

Dunaway v. New York: Is There a Military Application?

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Introduction

In the late 1970's, the Supreme Court ruled in two cases that the illegal seizure of an individual based on less than probable cause could result in suppression of evidence obtained as a result of the seizure. The nature of traditional investigative techniques employed by military law enforcement agencies significantly elevates the importance of these

decisions. The purpose of this article is to analyze the Supreme Court and military cases that have addressed this issue and to propose a rationale by which a military court might fairly reconcile these cases with accepted military investigatory practices.

In the first case, *Brown v. Illinois*,¹ police officers "arrested" the accused without a warrant. Following a lengthy

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¹ 422 U.S. 590 (1975).

period in custody, the accused made admissions implicating himself in a murder. The Supreme Court ruled that there was no probable cause to arrest Brown. Without a warrant based upon probable cause, Brown's seizure was considered unreasonable under the fourth amendment and his statements were ruled inadmissible unless the government could show sufficient attenuation from the unlawful arrest.² The Court specifically held that *Miranda*³ warnings alone were insufficient to attenuate the taint of the unlawful seizure.

The second case, *Dunaway v. New York*,⁴ involved another warrantless seizure of an individual without probable cause. Once in custody, the accused made several damaging admissions and drew some sketches implicating himself in an attempted robbery of a pizza parlor in which the proprietor was killed. The Supreme Court found *Dunaway* was seized within the meaning of the fourth amendment when he was taken involuntarily to the police station.⁵ The Court suppressed the accused's admissions and sketches, ruling them to be the fruits of a seizure made without probable cause. The Court said that the "accumulated wisdom of precedent and experience as to the minimum justification necessary to make the kind of intrusion involved in an arrest 'reasonable' under the Fourth Amendment"⁶ was the "probable cause" standard. Absent probable cause, only the briefest detention to "stop and frisk"⁷ an individual is authorized. The Court in *Dunaway* emphasized that any further detention or search must be based upon consent or probable cause.⁸

The Court found these two cases analogous in that the seizures in both instances were unsupported by probable cause.⁹ The mere fact that Brown was "formally" arrested was not considered dispositive.¹⁰ The essence of each case was the unreasonable seizure of the accused within the meaning of the fourth amendment, that is, a seizure without probable cause.¹¹

The police officers in both cases properly administered *Miranda*¹² warnings to the detainee. The Court held that properly administered *Miranda* warnings were not always a

sufficient safeguard of individual constitutional rights. The government must show the statements meet the fifth amendment standards of voluntariness and that the causal connection between the statements and the illegal seizure is sufficiently broken to purge the taint of the illegal seizure of the person.¹³ Thus, the Court imposed an exclusionary sanction founded on the fourth amendment to suppress statements, which are typically subject to analysis under fifth amendment considerations.

The Court's use of the term "custodial interrogation"¹⁴ to describe *Dunaway*'s detention may add to the confusion as to whether the standard should be based on fourth amendment or fifth amendment principles. Regardless of terminology, the *Dunaway* ruling is that any restriction on liberty in excess of that authorized by *Terry*¹⁵ requires probable cause or consent.¹⁶ Any statements obtained as a result of an unlawful detention are subject to suppression under the fourth amendment. The *Dunaway* Court specifically rejected the government's argument that a seizure for station-house interrogation did not require the same level of suspicion, namely probable cause, that is needed for an arrest.¹⁷

In subsequent cases, the Supreme Court has attempted to offer additional insights into the meaning of a "seizure" within the context of the fourth amendment.¹⁸ This has not proven to be an easy task.¹⁹ In *United States v. Mendenhall*,²⁰ the Supreme Court stated that persons are "seized" when, by means of physical force or show of authority, their freedom of movement is restrained.²¹ The Court said that "a person has been 'seized' within the meaning of the fourth amendment only if, in view of all the circumstances surrounding the incident, a reasonable person would have believed that he was not free to leave."²²

Dunaway in the Military Context

The *Dunaway* decision involved the warrantless seizure and transportation of a civilian to a police station for interrogation, necessarily interrupting the accused in whatever

² See *Wong Sun v. United States*, 371 U.S. 471 (1963).

³ *Miranda v. Arizona*, 384 U.S. 436 (1966).

⁴ 442 U.S. 200 (1979).

⁵ *Id.* at 207. The dissenters (Burger/Rehnquist) believed the facts showed the accused voluntarily accompanied the police. 422 U.S. at 225.

⁶ *Id.* at 208.

⁷ *Terry v. Ohio*, 392 U.S. 1 (1968).

⁸ *United States v. Brignoni-Ponce*, 422 U.S. 873 (1975).

⁹ 442 U.S. at 215.

¹⁰ *Id.*

¹¹ *Id.* at 216.

¹² *Miranda v. Arizona*, 384 U.S. 436 (1966).

¹³ 442 U.S. at 204.

¹⁴ *Id.* at 216.

¹⁵ *Terry v. Ohio*, 392 U.S. 1 (1968).

¹⁶ 422 U.S. at 212.

¹⁷ 442 U.S. at 213. As the *Dunaway* Court stated: "For all but those narrowly defined intrusions [i.e., *Terry*], the requisite 'balancing' . . . is embodied in the principle that seizures are 'reasonable' only if supported by probable cause." 442 U.S. at 214.

¹⁸ See *Florida v. Royer*, 460 U.S. 491 (1983), *United States v. Mendenhall*, 446 U.S. 544 (1980).

¹⁹ *Mendenhall* and *Royer* are difficult to distinguish.

²⁰ 446 U.S. 544 (1980).

²¹ *Id.* at 553.

²² *Id.* at 544. Although only Justice Rehnquist joined in this definition of "seizure" in *Mendenhall*, the majority of the Court adopted this definition as the standard in *Florida v. Royer*, 460 U.S. 491 (1983).

he was doing at the time.²³ When placed in the military context, this question of "seizure" of a person can plague the practitioner. The terms "apprehension" and "arrest" themselves have different meanings than in civilian practice. "Apprehension" in the military can be effected by a commander as well as law enforcement personnel,²⁴ and is distinguishable from a detention for investigative purposes.²⁵ Similar to civilian practice, however, a faulty apprehension is not a defense to the crime.²⁶ An apprehension is not required to perfect the jurisdiction of a court-martial.²⁷ An apprehension is simply defined as "the taking of a person into custody."²⁸

It is a well accepted military view that all servicemembers may be ordered anywhere at any time. It defies logic to say that a military order to report could be viewed by a court as a "seizure" requiring probable cause. There is no "probable cause" requirement to be ordered to Korea, Vietnam, or into combat. Disciplinary considerations require obedience to any lawful order to "report" to any place.²⁹ Additionally, investigative techniques encountered in the field usually involve coordination with the commander and subsequent transport of one or many "witnesses" to the Criminal Investigation Division (CID) office for "questioning." These "witnesses" are often related only tangentially to the offense under investigation. They may have been on duty at or near the time of the offense, or may have been acquainted with a victim or a suspect. Normal procedures do not contemplate the existence of "probable

cause" prior to interfering with a soldier's freedom of movement. Accepted procedures require soldiers to report, and usually the requirement is relayed to the soldier as an order which the soldier must obey.³⁰

The Court of Military Appeals has failed to address the issue in this context.³¹ Although *United States v. Schneider*³² and *United States v. Scott*³³ have been referred to as authority on the issue,³⁴ in both cases the Court of Military Appeals resolved the case by finding probable cause to apprehend the accused prior to the time the accused made incriminating statements.³⁵ When probable cause exists to apprehend, an "unreasonable" seizure within the meaning of the fourth amendment does not occur, and the *Dunaway* analysis does not apply.³⁶ Thus, the discussions of *Dunaway* in these opinions are dicta.³⁷

In *United States v. Sanford*,³⁸ the accused's commander sent a noncommissioned officer, Sergeant First Class Lander, to bring the accused to him for questioning. On the way into the commander's office, Sanford passed a brown pouch to another soldier, saying "Hold this for me." Sergeant First Class Lander seized the pouch from the other soldier. The commander opened the pouch in his office and discovered marijuana.³⁹ The Court of Military Appeals, using the *Mendenhall* analysis, determined that Sanford had not been seized, as the accused could not reasonably conclude that the NCO's action constituted a seizure for "law

²³ *Dunaway*, in fact, was taken from a private dwelling.

²⁴ *Manual for Courts-Martial, United States*, 1984, Rule for Courts-Martial 302(b) [hereinafter R.C.M.].

²⁵ *Manual for Courts-Martial, United States*, 1984, Rule for Courts-Martial 302(a)(1) discussion [hereinafter R.C.M. 302(a)(1) discussion].

²⁶ 1 W. LaFare, *Search and Seizure, A Treatise on the Fourth Amendment*, section 1.9(b). "The state and federal courts, with virtual unanimity . . . have held that the unlawfulness of an arrest does not affect . . . the power of the trial court to proceed in a criminal case." *Id.*

²⁷ R.C.M. 302(a)(1) discussion.

²⁸ R.C.M. 302(a)(1).

²⁹ *Uniform Code of Military Justice* art. 86, 10 U.S.C. § 886 (1982) [hereinafter UCMJ]; UCMJ art. 92.

³⁰ UCMJ art. 92.

³¹ The Court of Military Appeals had an excellent opportunity to address this issue in *United States v. Smrek*, CMR 447046, *pet. denied* 22 M.J. 178 (27 January 1986). In November 1984, a registered mail bag turned up missing from the 19th Adjutant General Detachment (Postal) located in Yongsan, Korea. The bag contained several extremely sensitive items, including five classified documents and 245 ration control plates. One of the classified documents was a change to Op 58, the major plan for the defense of the Republic of Korea in the event of an attack by the North Koreans. Specialist Four Smrek had been seen in the area of the bag the evening before and was interviewed as a witness. He agreed to take a polygraph exam and accompanied Criminal Investigation Division (CID) agents to the polygraph office at 1415 hours on 9 November. There was no probable cause to apprehend Smrek. Smrek indicated deception on the polygraph and remained at Criminal Investigation Division in post-exam interrogation until 2205 hours that evening, when the polygraph examiners released him to his unit commander. Smrek had not made any admissions at this time and no probable cause existed to apprehend him. Smrek's company commander, under orders from the brigade commander, Colonel Wheeler, took Smrek directly to Colonel Wheeler's office. Colonel Wheeler warned Smrek of his UCMJ article 31 rights four times during their conversation, and delivered what could best be described as a "Christian burial speech," telling Smrek that the lives of all the soldiers on the peninsula depended on him. Smrek waived his rights a final time and took Colonel Wheeler to the bag, which was buried in a secluded area nearby. At trial, evidence of Smrek's actions was admitted over defense objection, and Smrek was convicted of theft of the bag contrary to his pleas. With these facts, the Court of Military Appeals could have definitively ruled whether Smrek was seized within the meaning of *Dunaway* when he was transported to Colonel Wheeler's office, or that Smrek's statements were involuntary notwithstanding the rights advisement and waiver.

³² 14 M.J. 189 (C.M.A. 1982).

³³ 22 M.J. 297 (C.M.A. 1986).

³⁴ See, e.g., Thwing & Washington, *Piercing the "Twilight Zone" Between Detention and Apprehension*, *The Army Lawyer*, Oct. 1986, at 43.

³⁵ 14 M.J. at 194, 22 M.J. at 307.

³⁶ 442 U.S. at 208. The *Dunaway* court clearly stated that probable cause works to make an arrest "reasonable" under the fourth amendment. *Id.*

³⁷ "A judge's power to bind is limited to the issue that is before him; he cannot transmute dictum into decision by waving a wand and uttering the word 'hold'." *United States v. Rubin*, 609 F.2d 51, 69 (2d Cir. 1979), *aff'd. on cert. limited to another issue*, 449 U.S. 424, 428 (1981). Dictum, in the traditional sense, is a statement broader than required. *United States v. Pierre*, 781 F.2d 329, 333 (2d Cir. 1986). As stated by Chief Justice Marshall, interpreting *Marbury v. Madison*, 5 U.S. 137 (1803) (1 Cranch), " . . . general expressions, in every opinion, are to be taken in connection with the case in which those expressions are used. If they go beyond the case they may be respected, but ought not to control the judgement in a subsequent suit, when the very point is presented for decision." *Cohens v. Virginia*, 19 U.S. 264, 399 (6 Wheat.).

³⁸ 12 M.J. 170 (C.M.A. 1981).

³⁹ *Id.* at 172.

enforcement purposes."⁴⁰ The court implied that a seizure does not take place unless the accused knows or should know he is being summoned for a law enforcement purpose.⁴¹ The *Sanford* court specifically found that Sanford had no expectation of privacy in the pouch and upheld its admission into evidence.⁴²

The courts of military review have, on several occasions, addressed situations where a suspect was "seized" for investigatory purposes without probable cause. In *United States v. Wynn*,⁴³ the trial judge ruled that an illegal apprehension of military personnel unsupported by probable cause does not affect admissibility of evidence because a servicemember has no expectation of freedom of liberty with respect to the "seizure" of his or her person.⁴⁴ The Army Court of Military Review emphatically disagreed with this position,⁴⁵ stating that fourth amendment protections under *Brown* and *Dunaway* are as applicable to servicemembers as they are to the rest of the citizenry. Finding the apprehension to be without probable cause, and therefore unreasonable under *Dunaway*, the court nonetheless affirmed Wynn's conviction. The *Wynn* court held the admission of the contested evidence to be harmless error beyond a reasonable doubt.⁴⁶

The Navy Court of Military Review addressed the issue in two cases, *United States v. Price*⁴⁷ and *United States v. Hardison*.⁴⁸ In *Price*, the Navy court examined the seizure of an accused along with ten other sailors for questioning in a murder investigation. The court reviewed *Schneider* and *Dunaway* and determined those holdings did not mandate a finding that the accused had been unlawfully seized while his shipmates had not. As noted by the court, such a result would prohibit all investigatory interviews in the absence of probable cause. In *Hardison*, the Navy-Marine court again held that an order to report for questioning was not a "seizure" within the meaning of the fourth amendment. The *Hardison* court seemingly ignored the "law enforcement purpose" distinction outlined by the Court of Military Appeals in *Sanford*, holding that "a service member is not free

to disobey an order to report even if it is for law enforcement purposes. The intrusiveness of the order does not increase because of its purpose."⁴⁹ In short, the *Hardison* court held that an order to report, regardless of the reason, is not a seizure within the meaning of the fourth amendment.

In *United States v. Thomas*,⁵⁰ the Army Court of Military Review reached a result similar to that of the Navy-Marine Court in *Hardison*. The Army court noted that while a "seizure" for investigatory purposes might be unlawful in the civilian world, military necessity required that constitutional rights must sometimes be applied differently to servicemembers.⁵¹

The court held that *Dunaway* was not applicable to a situation where a soldier is ordered to report to a specific location pursuant to a lawful order.⁵² The court reasoned that under the *Mendenhall* test, merely being ordered to the CID office does not equate to a seizure under the fourth amendment.⁵³ The court then espoused the so called "*Mendenhall/Sanford*" test:

[A] person is seized only when, by means of physical force or a show of authority, as viewed in the context of the military and its daily operations, his freedom of movement is restrained significantly beyond that point where other service members' freedom of movement can be circumscribed without constitutional infringement. It is only when this degree of restraint is imposed that there is any foundation whatsoever for invoking constitutional safeguards.⁵⁴

It seems likely that the *Thomas* court would require that actual confinement, or restriction tantamount to confinement,⁵⁵ be based on probable cause. Absent restrictions "significantly beyond" those normally associated with the acumen of military regime, an accused would be "on duty," and subject to no unreasonable restraint if merely seated at the CID office as outlined above. Except for the unnecessary reliance on *Sanford*,⁵⁶ this appears to be the best reasoned analysis by a military appellate tribunal and is

⁴⁰ *Id.* at 173. The court seemed to create a distinction between a commander summoning an accused for a military purpose as opposed to a law enforcement purpose.

⁴¹ *Sanford* is an anomaly for this and several other reasons. First, the court found *Dunaway* applicable to the accused being brought to the commander's office for a law enforcement purpose, where *Dunaway* specifically related to a police station detention. The court also found that probable cause to apprehend was lacking on these facts. Considering the facts in both *Schneider* and *Scott*, and the facts in this case, it seems the court could easily have found probable cause to apprehend based on Sergeant First Class Lander's observation of a drug deal and the commander's identification of the accused. *Sanford* has not since been cited by the Court of Military Appeals.

⁴² 12 M.J. at 174-75.

⁴³ 11 M.J. 536 (A.C.M.R. 1981).

⁴⁴ *Id.* at 537.

⁴⁵ The Army Court of Military Review termed the military judge's ruling a "novel approach." 11 M.J. at 538. Interestingly, this court adopted virtually the same approach in *United States v. Thomas*, 21 M.J. 932 (A.C.M.R. 1975).

⁴⁶ 11 M.J. at 539.

⁴⁷ 15 M.J. 628 (N.M.C.M.R. 1982), *petition denied*, 16 M.J. 156 (C.M.A. 1983).

⁴⁸ 17 M.J. 701 (N.M.C.M.R. 1983).

⁴⁹ *Id.*

⁵⁰ 21 M.J. 928 (A.C.M.R. 1986).

⁵¹ *Id.* at 932. The court cited *Parker v. Levy*, 417 U.S. 733 (1974) and *Brown v. Glines*, 444 U.S. 348, 354 (1980). Each of these cases allowed military intrusions on the servicemember's first amendment rights.

⁵² 21 M.J. at 933. The court cited *United States v. Sanford*, 12 M.J. 170 (C.M.A. 1981).

⁵³ 21 M.J. at 933.

⁵⁴ *Id.* at 932-33.

⁵⁵ See, e.g., R.C.M. 304, R.C.M. 305.

⁵⁶ See note 41, *supra*.

consistent with the common experience of military life. As noted above, the Navy-Marine Court of Military Review reached a similar result in *Hardison*,⁵⁷ holding that in the military an order to report for any reason is not a seizure within the meaning of the fourth amendment. Although *Hardison* and *Thomas* were decided prior to the Court of Military Appeals decision in *Scott*, the *Scott* opinion did not cite or address either case. Again, the *Dunaway* analysis outlined in *Scott* is dicta. Although the rationale may be followed if sufficiently persuasive, it is not controlling.⁵⁸

Approaches for the Military Practitioner

There are at least three different approaches to reconcile the *Dunaway* analysis in the military setting. First, under a *Mendenhall* analysis, private citizens enjoy a much greater expectation of privacy in their freedom of movement than does the soldier. Applying the *Mendenhall* analysis, there is no subjective or objective expectation in a freedom of liberty that is offended by an order to report to commander or CID office for a law enforcement purpose, thus probable cause is not required. Second, the fourth amendment proscribes only "unreasonable" searches and seizures. "Probable cause" is only one way in which the government can show that a seizure or invasion of privacy is reasonable. Several cases have balanced the government interests against the intrusion on privacy and liberty interests and have determined that the intrusions were "reasonable" under the circumstances without probable cause.⁵⁹ The military's need to maintain discipline can likewise be balanced in a *Dunaway*-type intrusion in favor of a finding that the seizure is reasonable under the circumstances. Finally, the Supreme Court has suggested that a *Dunaway*-type intrusion may be permissible if judicially authorized.⁶⁰ One approach is simply to prohibit military law enforcement personnel from picking up soldiers for questioning absent coordination with the commander. This process should apply at every stage, either investigatory or accusatory. Arguably, the commander's authorization serves as a de facto judicial authorization for these seizures when they are viewed in the context of military operations.

A Soldier's Lessened Expectation of Privacy

Mendenhall defines a fourth amendment seizure as one in which, "... in view of all of the circumstances surrounding the incident, a reasonable person would have believed that he was not free to leave."⁶¹ A person is seized only when, by means of physical force or show of authority, his or her freedom of movement is restrained.⁶² In short, the fourth amendment protects a citizen's "expectation of individual freedom." As outlined by the Army court in *Thomas*,⁶³ soldiers simply do not enjoy the same "freedom of liberty" as civilians.⁶⁴ In the military context, an order to report to CID offices is not viewed as an interruption in the soldier's life. A soldier is on duty 24 hours a day and is required to be available for duty. Even leave status is subject to disapproval and revocation.⁶⁵ Particularly in overseas assignments, soldiers must be prepared to report to duty within an hour of an "alert," which can occur at any time. The soldier, seated at the law enforcement office, is receiving pay and rations and is, according to any order given, at their place of duty. Whether the soldiers are "free to leave" can fairly be viewed only as to whether the soldiers are "free to leave" their unit area, which freedom is subject to revocation at almost any time. Under a pure *Mendenhall* analysis, then, reasonable soldiers only feel truly "free to leave" their unit or duty area when they obtain authorization to do so. If the soldiers are located at CID in a *Dunaway* situation, their freedom of movement has not truly been restrained within the meaning of *Mendenhall*.

A Balancing Test to Determine "Reasonableness"

The next avenue of analysis concerns the requirement that searches and seizures under the fourth amendment be reasonable. As noted in *Dunaway*, a seizure based on probable cause is reasonable.⁶⁶ Probable cause, however, is not the only method by which an intrusion may be considered reasonable. In *United States v. Brignoni-Ponce*,⁶⁷ the Supreme Court analyzed a border patrol officer's authority to stop cars near the Mexican border to determine whether illegal aliens were present.⁶⁸ The Court held the fourth amendment applied to all seizures of the person, no matter how brief⁶⁹ yet noted that reasonableness depends on a balance between the public interests and the individual right to personal security,⁷⁰ citing *Terry v. Ohio*⁷¹ and *Camara v. Municipal Court*.⁷² The Court found that the government

⁵⁷ 17 M.J. 701 (N.M.C.M.R. 1983).

⁵⁸ *Humphrey's Executor v. United States*, 295 U.S. 602, 627-628 (1935).

⁵⁹ *New Jersey v. T.L.O.*, 469 U.S. 325 (1985); *United States v. Brignoni-Ponce*, 422 U.S. 873 (1975); and *Terry v. Ohio*, 391 U.S. 1 (1968).

⁶⁰ *Davis v. Mississippi*, 394 U.S. 721, 728 (1969), *Hayes v. Florida*, 470 U.S. 811, 814 (1985). The cited language is dicta on this point; neither case involved a judicial authorization for seizure of the defendant.

⁶¹ 446 U.S. at 556.

⁶² *Id.* at 553.

⁶³ 21 M.J. 928 (A.C.M.R. 1986).

⁶⁴ See, e.g., *United States v. Valenzuela*, 24 M.J. 934 (A.C.M.R. 1987), holding that soldiers do not have a justifiable expectation of privacy from urine testing performed to determine military readiness.

⁶⁵ See, e.g., Army Reg. 630-5, *Leaves and Passes*, Chapter 2 (1 July 1984).

⁶⁶ 442 U.S. at 208.

⁶⁷ 422 U.S. 873 (1975).

⁶⁸ The court specifically refused to find these stops to be a "functional equivalent" of a border stop. *Id.* at 876.

⁶⁹ *Id.* at 878.

⁷⁰ *Id.*

⁷¹ 392 U.S. 1 (1968).

⁷² 387 U.S. 523 (1967).

made a "convincing demonstration" that the public interest demands such measures to stem the tide of illegal aliens.⁷³ The Court also noted that, in appropriate circumstances, the fourth amendment allows a "seizure" on facts that do not support probable cause to arrest, so long as the intrusion is balanced against the government interest, and the stop and inquiry are reasonably related to the justification for the initial intrusion.⁷⁴ The Court, in *New Jersey v. T.L.O.*,⁷⁵ adopted a balancing test to determine whether a search of a student's pocketbook was reasonable under the fourth amendment, weighing the child's privacy against the interests of teachers and administrators in maintaining discipline. The Court in *T.L.O.* concluded that this balancing test does not require probable cause, rather, the legality of a search of a student depends on the reasonableness of the search considered under all the circumstances.⁷⁶ The Supreme Court noted that the focus on "reasonableness" would allow school officials to enforce discipline according to common sense and would also ensure that the children's privacy would not be unnecessarily invaded.⁷⁷

The military courts could similarly fashion a standard whereby the reasonableness of a seizure in the military setting would be determined by balancing the limited privacy expectations of the servicemember against the needs of the command to preserve good order and discipline. A military court could find it reasonable to detain and question a victim's barracks mates in a larceny investigation when the detention is balanced against the disciplinary problems encountered by the command should barracks thefts go unsolved and unpunished.

The military courts have recognized that servicemembers have a lesser expectation of privacy than civilians in many fourth amendment situations. The soldier's expectation of privacy does not extend to exemption from unit health and welfare inspections.⁷⁸ The Court of Military Appeals has used this analysis to uphold the admissibility of urinalysis

results at courts-martial.⁷⁹ Reasonableness is the ultimate standard, and in this area, it is the only approach which gives full recognition to competing public and private interests.⁸⁰

"Judicial Authorization" of the Intrusion By Use of the Commander

The final approach analyzes cases allowing investigatory detentions when judicially authorized. In *Davis v. Mississippi*,⁸¹ the Supreme Court suppressed fingerprints taken during a "dragnet" in which the police took the accused and 24 other black youths to the police station for fingerprinting and questioning in a rape investigation.⁸² Although the police in that case acted without judicial authorization in detaining the individuals, Justice Brennan⁸³ wrote that an authorization in conjunction with "narrowly circumscribed procedures" for obtaining fingerprints would not violate the fourth amendment.⁸⁴

In *Hayes v. Florida*,⁸⁵ the Supreme Court reiterated this position on similar facts, noting that *Davis* had similarly involved a detention at police headquarters "without probable cause to arrest and without authorization by a judicial officer."⁸⁶ Again, the Court stated in dicta, "We don't abandon the suggestion that the fourth amendment might allow the judiciary to seize on less than probable cause."⁸⁷ In each case, the police made no attempt to comply with warrant procedures under the fourth amendment before detaining and fingerprinting the defendants.⁸⁸ In *Johnson v. United States*,⁸⁹ the Supreme Court succinctly stated, "[w]hen the right to privacy must reasonably yield to the right of search is, as a rule, to be decided by a judicial officer, not by a policeman or government enforcement agent."⁹⁰

Other cases stand for the proposition that judicial authorization may be used to detain an individual. In *United*

⁷³ 422 U.S. at 878.

⁷⁴ *Id.* at 881.

⁷⁵ 469 U.S. 325 (1985).

⁷⁶ *Id.* at 341. The Court held that a twofold inquiry should be used to determine reasonableness: first, whether the action was justified at its inception; and second, whether the search as actually conducted "was reasonably related in scope to the circumstances which justified the interference," citing *Terry v. Ohio*.

⁷⁷ *Id.* at 343.

⁷⁸ *United States v. Middleton*, 10 M.J. 123 (C.M.A. 1981). See also *Mil. R. Evid.* 313.

⁷⁹ *Murray v. Haldeman*, 16 M.J. 74 (C.M.A. 1983). See also *United States v. Johnston*, 24 M.J. 271 (C.M.A. 1987).

⁸⁰ *Camara v. Municipal Court*, 387 U.S. 523, 539 (1967).

⁸¹ 394 U.S. 721 (1969).

⁸² This case obviously reflects the Court's disapproval of tactics employed by a deep south police department in the 1960's "investigating" a rape of a white woman by a black perpetrator. *Davis* was fingerprinted not once, but twice, and subjected to interrogation on these occasions as well as several others. He was once driven by the police to a town 90 miles away and incarcerated overnight. 394 U.S. at 722-723. The dissent in the case, while likewise disagreeing with the tactics employed, noted the futility of suppressing fingerprint evidence when such evidence could easily be reobtained by court order after the decision for use in a subsequent trial. 394 U.S. at 730.

⁸³ Brennan was also the author of the *Dunaway* decision.

⁸⁴ 394 U.S. at 728.

⁸⁵ 470 U.S. 811 (1985).

⁸⁶ *Id.* at 814 (emphasis added).

⁸⁷ *Id.* at 817.

⁸⁸ The dicta in *Davis* and *Hayes* may seem to be incompatible with the court's holding in *Dunaway*. For an analysis of the consistency of these opinions, see 3 W. LaFave, *Search and Seizure, A Treatise on the Fourth Amendment*, section 9.6(b), pp. 562-65.

⁸⁹ 333 U.S. 10, 14 (1948).

⁹⁰ *Id.*

States v. Dionisio,⁹¹ the Supreme Court held that a subpoena to appear before a grand jury is not a seizure under the fourth amendment,⁹² even where 20 individuals were summoned to give voice exemplars. In *Camara v. Municipal Court*,⁹³ the Supreme Court elaborated on the fourth amendment warrant requirements in the area of housing inspections. The Supreme Court noted that the fourth amendment did not prohibit these inspections, it only prohibited such inspections made *without a warrant*.⁹⁴ As in *New Jersey v. T.L.O.*,⁹⁵ the Supreme Court emphasized the controlling standard of "reasonableness" in justifying an intrusion based on less than probable cause.⁹⁶

In the military context, the Navy-Marine Court of Military Review approved the fingerprinting of over 100 Marines by the Naval Investigative Service (NIS) while investigating a series of larcenies.⁹⁷ That court held that the accused was "insulated" from unilateral police action by his commander, who authorized the fingerprinting and ordered the individuals to report to NIS.⁹⁸ *Davis*, *Hayes*, *T.L.O.*, and *Camara* all support this approach when one views the commander as acting as a judicial officer in authorizing this type of detention for a law enforcement purpose.

In the military setting, commanders are often placed in the role of a judicial officer in the fourth amendment sense, and are empowered to authorize searches and seizures of their soldiers and property so long as they remain impartial.⁹⁹ It is logical that a commander should be able to authorize detentions of individuals on less than probable cause as stated in dicta in *Davis* and *Hayes*. In the course of a military investigation, law enforcement personnel rarely, if ever, detain an individual without coordination with the individual's commander. Such a practice is rooted in the strict personnel accountability inherent to military life. It also provides procedures that insulate military members from unilateral police action. The commander's review of the law enforcement request provides a reasonable framework for police intrusion.¹⁰⁰

Conclusion

The military courts have not conclusively resolved the issue of whether *Dunaway v. New York* applies to statements

obtained from a servicemember who is detained for an investigatory purpose without probable cause. Three avenues of analysis all lead to the conclusion that the *Dunaway* decision should not apply in the usual military situation. Servicemembers, who have a significantly reduced expectation of privacy in their freedom of movement, should not find it "unreasonable" within the meaning of the fourth amendment to be ordered to a law enforcement office for questioning. Under *Mendenhall*, a soldier who has been ordered to report to a military law enforcement agency, has not truly been "restrained" as might be the case in the civilian sense, thus, suppression of any statements made during a detention is not required under *Dunaway*. Second, the balancing tests outlined by the Supreme Court in *T.L.O.* and *Camara* emphasize the importance of reasonableness. In the military context, the military's need to maintain discipline can be balanced against the intrusiveness of a custodial interrogation. An appropriate balance allows a finding that this type of seizure is reasonable under circumstances not amounting to probable cause. Finally, a military commander can fairly be characterized as a judicial officer under the fourth amendment. When acting in this capacity, the chain of command insulates the servicemember from unreasonable law enforcement operations. The order to report to law enforcement officials serves as a de facto judicial authorization for the detention. This is in accord with the *Davis v. Mississippi* dicta, the warrant requirements outlined in *Camara*, and the subpoena process approved in *Dionisio*.

The literal application of *Dunaway* to the military is contrary to the investigatory methods currently used by commanders and military law enforcement personnel. The lack of a definitive ruling on this issue by the military appellate courts has exacerbated the situation. Until the military courts clarify this issue, any or all of the three avenues of approach outlined above may be used to challenge the strict applicability of *Dunaway* to the military setting.

⁹¹ 410 U.S. 1 (1973).

⁹² *Id.* at 9.

⁹³ 387 U.S. 523 (1967).

⁹⁴ *Id.* at 533-34.

⁹⁵ 422 U.S. 873 (1975).

⁹⁶ 387 U.S. at 539.

⁹⁷ *United States v. Fagan*, 24 M.J. 865 (N.M.C.M.R. 1987).

⁹⁸ 24 M.J. at 868. The accused was not only "ordered" to NIS, he was informed his paycheck would be withheld until he went. 24 M.J. at 866. This seems to fit squarely within the so-called *Mendenhall/Sanford* test espoused by the Army court in *Thomas*, i.e., a restraint of movement "significantly beyond that point where other servicemembers' freedom of movement can be circumscribed without constitutional infringement." 21 M.J. at 932-33. Clearly, the better method is to use appropriate UCMJ sanctions for a UCMJ art. 92 violation if a servicemember refuses to report as ordered.

⁹⁹ Mil. R. Evid. 315(d).

¹⁰⁰ An additional factor must be considered in this area. One of the most significant distinctions between Justice Brennan's dicta in *Davis* (suggesting judicial authorization) and his ruling in *Dunaway* (that all seizures must be supported by probable cause), is the nature of the evidence obtained. The evidence in *Davis*, *Dionisio* and *Fagan* was voice exemplars or fingerprints. These consistently enjoy a less protected status under the fourth or fifth amendments than statements and confessions, which were the subject of the *Dunaway* suppression. Justice Brennan mentioned this difference, noting that in *Davis* "petitioner was not merely fingerprinted during the detention but also subjected to interrogation." 422 U.S. at 215. Of course, military practice differs from that of the civilian world in that the servicemember enjoys additional protection against self-incrimination found in UCMJ art. 31, beyond the fifth amendment and *Miranda*.

USALSA Report

United States Army Legal Services Agency

The Advocate for Military Defense Counsel

Scientific Evidence: Challenging Admissibility

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Introduction

Forensic evidence mixes two disciplines, science and law. Law, however, governs the use of any evidence, and defense advocates cannot allow the discipline of science to displace legal process. A courtroom is not a laboratory. A result valid for laboratory use can, in the courtroom, effectively deprive an accused of the presumption of innocence and insulate evidence from the rigors of skeptical scrutiny.

The purpose of this article is to remind judges and lawyers that their focus should be on providing a fair trial for the accused, rather than on allowing admission of new and questionable scientific evidence. The liberal trend to admit broad categories of evidence has dangerously combined with our tendency to embrace technology and its comforting promise of certainty. This combination can result in conviction based upon evidence truly understood by no one other than the self-described expert who offered it. This creates a fertile opportunity for quasi-scientific snake oil salesmen and outright charlatans.

Perhaps the willingness of judges and lawyers to trust technology is, in part, driven by an unwillingness to admit we do not truly understand its substance. Reliance upon more liberal rules of evidence conveniently cloaks our scientific illiteracy.¹ In a symposium on science and the rules of evidence it was reported, "none was as unpopular with the judges as scientific evidence."² The commentator asked, "How can we expect attorneys to be concerned about scientific evidence if the judges do not perceive it as a problem?"³ Professor Joseph Nicol observed, "The scientific illiteracy of nearly all lawyers is a disgrace to their profession."⁴ Considering that scientific evidence is often unchallenged, it is small wonder that, as one court commented, "Scientific evidence may in some instances assume

a posture of mystic infallibility in the eyes of a jury or laymen."⁵

The answer to this problem is not to become scientifically literate, as suggested by Professor Nicol. The answer is to apply the legal expertise in which we are trained. Defense advocates must penetrate the myth of infallibility by challenging the foundation of scientific evidence just as they would with any other evidence. Standards of admissibility should not be abandoned just because some evidence is difficult to understand. We must insist that the relevance and reliability of all evidence be clearly demonstrated. Blind faith in technology is not an acceptable substitute for legal process.

Challenging the Foundation of Scientific Evidence

The validity of a scientific test will often be less important than the events surrounding its use. There are six areas of examination that defense counsel should probe that have nothing to do with the theoretical validity of a given test.

Discovery and Pretrial Investigation

Counsel cannot expect to be prepared to examine the testimony of an expert without having interviewed him prior to trial. This is the best opportunity for developing a challenge to the credentials of the expert, the validity of the procedures used, the reliability of the laboratory where they were performed, and the handling of the actual evidence. Once the case comes to trial, counsel cannot expect questions in these areas to be fruitful without preparation.

An excellent starting point for pretrial questions is the forensic report itself.⁶ Counsel will likely find it states only general conclusions.⁷ Professor Andre A. Moenssens, a recognized expert on the subject of scientific evidence,

¹ Consider, for example, how easy it must be to follow this standard of admissibility: "The opinion of an expert on any question of science is always admissible." *Breland v. State*, 134 Ga. App. 259, 214 S.E.2d 186 (1975).

² *Symposium on Science and the Rules of Evidence*, 99 F.R.D. 187, 220 (1983).

³ *Id.* at 221.

⁴ *Id.*

⁵ *United States v. Addison*, 498 F.2d 741, 743 (D.C. Cir. 1974). The failure of defense counsel to challenge scientific evidence most certainly contributes to its appearance of infallibility. As one court noted, when an expert opinion is insulated from cross-examination, the aura of infallibility may be enhanced. *Commonwealth v. McCloud*, 457 Pa. 310, 322, A.2d 653, 655 (1974).

⁶ *Imwinkelreid, The Methods of Attacking Scientific Evidence* (1982), also gives detailed suggestions on areas of vulnerability and questions that can be asked.

⁷ As the Army Court of Military Review noted, "Since most laboratory reports only state general conclusions, they may be given far more significance in court than they rightly deserve." *United States v. Davis*, 14 M.J. 847, 848 n.3 (A.C.M.R. 1982). When the results and conclusions of forensic reports are offered as unexamined hearsay, defense counsel should usually object to their admission. See Novotne, *Forensic Reports and the Business Records Exception*, *The Army Lawyer*, Dec. 1986, at 37 for a full discussion.

commented, "Clearly, the analyses conducted by forensic laboratory examiners should contain some basic information that will make the documents worthy of the title 'report.'" ⁸

Professor Moenssens suggests that the reports contain certain specific information, and that defense counsel secure this information through the use of depositions or comparable discovery procedure. First, the report should identify the methodology used.⁹ Second, depending upon the test and instruments used and the quality of the sample, the degree of certainty may vary from a conclusion expressed as a mere possibility to one of strong probability. The level of certainty should be expressly identified. Third, the reasons for choosing a particular scientific method should be given. Examiners sometimes ignore methods that are more accurate, but in which they are not proficient, or they may ignore methods that are more accurate and more expensive. Fourth, the names of the actual examiners, testers, or technicians who participated in the analysis should be given. Fifth, the credentials of these personnel and the expert who will testify in court should be attached. Sixth, the objective data, findings, or measurements should be included. Seventh, the ultimate conclusions derived from this data should be explained and correlated to the data.¹⁰

In military practice, defense counsel have broad discovery rights¹¹ and may only need to specifically request information in these areas in order to secure it. If additional information is needed to prepare for trial and is not forthcoming, other alternatives are available.¹²

Credentials

Experts are often self-appointed. In many forensic areas, no one issues credentials and no objective standards exist for the verification of expertise.¹³ If there is no source issuing credentials, an expert should be asked why. The answer to this question should suggest to the fact-finder that a

claim of expertise is less than perfect, or that an expert may be over-extending his knowledge and training. Counsel should also be sensitive to the possibility that the "expert" may in fact be an outright fraud.¹⁴

Perhaps even more important than the credentials of the expert, are the credentials of the personnel who participated in the scientific procedures used. Presently, there are no national standards for the training and certification of crime lab employees.¹⁵ In a significant case involving the validity of new blood analysis techniques, it was discovered that scientific tests were represented as having been conducted by the expert, when lab technicians had performed the work.¹⁶ Combined with other irregularities, this caused the case to be reversed.¹⁷

The credentials of the laboratory itself should be examined. Although tests conducted in blood banks, clinics, and hospitals are routinely tested for quality control, this is seldom done in crime labs.¹⁸ When the quality of work at crime labs has been independently tested, many commentators report alarming error rates.¹⁹ In a 1985 test, 30% of 51 labs were unable to correctly identify the contributor of an unknown serological stain.²⁰ A three-year study by the Forensic Science Foundation found that of 250 laboratories (which took part in at least one of the tests offered), 71% failed to correctly identify a blood sample, 14% failed to match bullets properly, 34% could not match paint samples, 22% could not distinguish among metal samples, 50% could not identify dog hairs, and 18% failed to analyze a document correctly.²¹

These figures justify defense counsel inquiries about the quality control procedures, error rate, and credentials of a crime laboratory. The figures also illustrate why many laboratories possess no accreditation. As of 1982, only eight laboratories, all in Illinois, were awarded certificates of accreditation by the American Society of Crime Laboratory Directors.²²

⁸ Moenssens, *Admissibility of Scientific Evidence—An Alternative to the Frye Rule*, 25 Wm & Mary L. Rev. 545, 569 (1984).

⁹ *Id.*

¹⁰ The seven points in this paragraph are taken from Moenssens at 570-71.

¹¹ See Manual for Courts-Martial, United States, 1984, Rule for Courts-Martial 701 [hereinafter R.C.M.].

¹² See R.C.M. 703(d); Hahn, *Voluntary and Involuntary Expert Testimony in Courts-Martial*, 106 Mil. L. Rev. 77 (1984). If there is some indication that documents supporting the forensic report exist, Jencks Act relief may be appropriate. See Burnette, *Workshopping the Jencks Act*, The Army Lawyer, June 1987, at 22.

¹³ For example, fingerprint experts began a certification process in 1977, and only 47% of court-accepted experts passed the certification exam. Moenssens, *supra* note 8, at 560, n.63. Handwriting examiners only recently developed accrediting procedures, and such credentials are rare. Moenssens and Inbau, *Scientific Evidence in Criminal Cases* 499 (1978). Firearms and ballistic experts also lack regular accrediting procedures. Joling and Stern, *Qualifying and Using the Firearms Examiner as a Witness*, 26 J. Forensic Sci. 166 (1980).

¹⁴ In the case of *People v. Cornille*, 95 Ill.2d 497, 448 N.E.2d 857 (1983), it came to light that an arson investigator who had testified repeatedly in prosecutions was an imposter.

¹⁵ Bretz, *Scientific Evidence and the Frye Rule: The Case for a Cautious Approach*, 4 Cooley L.R. 506, 511 (1987); *The Admissibility of Electrophoretic Methods of Genetic Marker Bloodstain Typing Under the Frye Standard*, 11 Okla. City U.L. Rev. 773, 807-12 (1986).

¹⁶ Bretz, *supra* note 15, at 519.

¹⁷ *People v. Young*, 425 Mich. 470, 391 N.W.2d 270 (1986).

¹⁸ Bretz, *supra* note 15, at 511, citing Grunbaum, *Problems Inherent in the Analysis of Rape Evidence—State of the Art*, 13 Forum No. 5 at 33 (1986).

¹⁹ Peat, Finnegan and Finkle, *Proficiency Testing in Forensic Toxicology: A Feasibility Study*, 28 J. Forensic Sci. 138 (1983); Ginov and Gottschalk, *Results of Nine Laboratory Surveys of Forensic Toxicology Proficiency*, 22 Clin. Chem. 843 (1976).

²⁰ Bretz, *supra*, at 511, citing Collaborative Testing Services, Inc., *Crime Lab Proficiency Testing Program Reports*, Rep. 85-2 (1985).

²¹ Moenssens, *supra* note 8, at 561 n.66; see also, Imwinkelreid, *The Constitutionality of Introducing Evaluative Laboratory Reports Against Criminal Defendant*, 30 Hastings L.J. 621, 629 (1979), where in a survey of 235 forensic labs 40% failed to correctly identify the blood type of a known sample. Of special interest to military servicemen is the estimate that 10% of the blood types listed on servicemen's dog tags during WWII were incorrect. 2 Am. Jur. Proof of Facts, Blood Types 608 (1959).

²² Moenssens, *supra* note 8, at 561, n.64.

When an expert presents his credentials to the court, defense counsel should question the quality controls and credentials of the laboratory. Counsel should also ask whether controls extend to blind testing of the sample and objective review of results by a second examiner.²³

Authentication of an expert's credentials also provides the defense an opportunity to authenticate impeaching evidence. If there is a treatise or an article by a known authority questioning the scientific method used in the case, the expert's familiarity with it not only tests his expertise, but also gives the impeaching source greater weight when the authority is acknowledged. Similarly, experts should be asked if they are aware of research that contradicts the theory they relied upon, or describes a method superior to theirs.²⁴ Needless to say, these questions cannot be posed without adequate pretrial preparation and interview of the witness.

Methodology

The question here is whether the scientific procedure was properly applied, as opposed to whether the procedure is valid. Was the laboratory protocol actually followed? There are a number of understandable human errors which can affect the reliability of a test. Errors that relate to timing, temperature, and mixing of ingredients will depend upon the specific test being used.²⁵ Defense counsel should also be alert for collateral errors. The maintenance and cleaning of laboratory equipment can cause false positive results.²⁶ Reagents used in some tests are unstable and break down when exposed to light, heat, or contamination.²⁷ Excessively long-term storage of reagents may also affect the reliability of a test.²⁸

Inherent to the question of methodology is whether the chain of custody was properly maintained from the point of collection through the performance of the test.²⁹ Chain of custody for scientific evidence involves more than simply establishing continuous possession of the sample. Some scientific tests are so sensitive that traces of contamination

caused by handling can cause false results.³⁰ Contamination with common substances such as mold, bacteria, dust, or detergent can produce false positive test results.³¹ Furthermore, some samples could degrade even when there is no contamination. Factors such as temperature and humidity can cause changes in the sample that would change the result of an identification test.³² Once blood leaves the body, it begins to deteriorate.³³

Contamination and degradation are important recurrent themes in the discussion of forensic evidence. An indisputably valid test is useless in the courtroom if the results reflect the composition of some contamination. It has been noted that:

Most of the experimental work has been done using dried bloodstains prepared in the laboratory under ideal conditions and with blood samples that contain an anticoagulant and/or preservative. Consequently, numerous reports cite "no problems" or "no mistypings" in "blind trials." However, recent publications are reporting definite alterations in apparent phenotypes in bloodstains and degraded samples for some of the enzyme and protein systems.³⁴

Doctor Grunbaum, a recognized blood identification expert, has observed that improvement in identification methodology will be to no avail if the sample has been altered by aging and deterioration.³⁵ He concluded, "proteins and enzymes degrade in unpredictable ways."³⁶

If the possibility of contamination and deterioration has not been considered in the execution of a forensic procedure, false identification can occur.³⁷ Counsel should recognize that scientific evidence in a criminal case is invariably contaminated and deteriorated. A bloodstain found on the floor of a room has mixed with dirt and dust found there, and has aged for an unknown period. An expert examiner should be required to account for these conditions.

This example illustrates that the skill and care of the crime scene investigator can be critical to the accuracy of

²³ Captain Timothy P. Riley, an experienced defense counsel, has suggested that, if possible, blind testing be advocated in actual cases. For example, a handwriting expert would be given several different samples to choose from when examining a questioned signature, and would not know which sample was the suspect's. If the government is confident that its scientific procedure is valid, it should be willing to subject the process to objective testing.

²⁴ In *People v. Young*, cited at n.17, the expert failed to disclose his knowledge of a judicial and professional dispute over the reliability of the blood identification technique used. As noted above, the irregularities in his presentation certainly contributed to the reversal and should be studied by counsel who anticipate examining an expert witness.

²⁵ For example, if antisera being used to identify blood type is either too strong or too dilute, it can cause false results. Denault, Takimoto, Kwan, & Pallos, *Detectability of Selected Genetic Markers in Dried Blood on Aging*, 25 J. Forensic Sci. 479, 481 (1980).

²⁶ Moenssens & Inbau, *supra* note 13, at 308.

²⁷ *Id.*

²⁸ Gaensslen et al, *Evaluation of Antisera for Bloodstain Grouping I*, J. Forensic Sci. 632, 644 (1985).

²⁹ For example, an untrained physician can destroy the usefulness of a semen sample if it is not properly collected and preserved. Findley, *Quantitation of Vaginal Acid Phosphatase and its Relationship to Time of Coitus*, 68 Am. J. Clin. Path. 238, 240 (1977).

³⁰ See Aye, *The Reliability of ABO Grouping of Bloodstains Contaminated with Sweat*, 18 J. Forensic Sci. 193 (1978).

³¹ Zajac, *Handbook for Forensic Individualization of Blood and Bloodstains* 160, 163 (Grunbaum ed. 1981).

³² Baechtel, *Forensic Science Handbook II*, at 371 (Saferstein ed., 1988).

³³ *State v. Washington*, 229 Kan. 47, 622 P.2d 986, 989 (1981), citing the testimony of Dr. Grunbaum that antigens, proteins, and enzymes are all subject to deterioration. This observation is certainly valid for other biological materials, and should prompt defense counsel to question whether such material has deteriorated.

³⁴ Zajac, *supra* note 31, at 167.

³⁵ Grunbaum, *Handbook for Forensic Individualization of Human Blood and Bloodstains* 103 (Grunbaum ed., 1981).

³⁶ *Id.*

³⁷ Boorman, Dodd, & Lincoln, *Blood Group Serology* 410 n.11 (1977); Culliford, *The Examination and Typing of Blood Stains in the Crime Laboratory* 75 n.3 (1971).

tests performed. Expert witnesses should account for methods of collection and preservation of evidence as well as the procedures used in the laboratory.³⁸

Relevance

Scientific evidence must meet the standards of admissibility that apply to all other evidence.³⁹ The question of relevance is often overlooked when scientific evidence is being examined. Defense counsel should challenge the government to demonstrate that the proffered evidence is probative.

Scientific evidence is often less than specific. For example, a blood type may simply identify 40% of the general public as possible donors.⁴⁰ The probative value of scientific evidence may be further diminished by the fact that results of a test are tentative.⁴¹ As the Court of Military Appeals has stated, "For any type of evidence to have logical relevance, however—scientific evidence included—some degree of reliability is implicit."⁴²

If a test can only identify a large portion of the population and if the results are less than conclusive, defense counsel should vigorously challenge the evidence. Such evidence will only serve to cloud the deliberations of the fact finder. Its probative value may be outweighed by the unwarranted aura of scientific accuracy it conveys.⁴³ Defense counsel must identify scientific tests that have little evidentiary value.⁴⁴

Scope

Limitation on the scope of scientific testimony naturally follows the examination of its relevance. Once the limited nature of a scientific test is recognized, speculative testimony beyond the scope of the test's results should not be allowed. The natural instinct to trust an expert should be resisted.

In one case, a ballistics expert testified that the recoil of a shotgun could have caused a red mark on the shoulder of

the suspect.⁴⁵ In another case, a chemist testified that LSD "made people go as far as to tear their eyes right out of their sockets, chew off an arm, jump out of windows, do some really . . . bizarre things."⁴⁶ As these examples illustrate, counsel should carefully identify the limits of a witness's expertise and the scientific test employed, and avoid the instinct to have the expert extrapolate.

Burden of proving admissibility

When scientific evidence has been offered, it is too easy for the parties to assume the defense must discredit the evidence to prevent its admission. As with any other evidence, the proponent must prove it is admissible, and is not entitled to any presumptions in favor of admissibility.⁴⁷ Defense counsel should also ensure the government assumes the burden of authenticating the procedure used in collecting the evidence, the chain of custody, and demonstrating that the sample was protected from contamination and degradation.⁴⁸

Admissibility of New Scientific Procedures—The Frye Test

After defense counsel have investigated the foundation of scientific evidence as suggested in the six steps listed above, the theoretical validity of the procedure should be examined. When a new scientific procedure is the basis for evidence, the government will probably cite *United States v. Frye*,⁴⁹ as authority for its admissibility. Unfortunately, *Frye* provides little or no practical guidance. The test simply states that a scientific theory will be accepted when it "is sufficiently established to have gained general acceptance in the community."⁵⁰

This is a statement of policy rather than an analytical test. Courts naturally want to be certain that scientific procedures are reliable before allowing them to be used as evidence. Most courts have taken a practical approach in deciding whether a scientific procedure is sufficiently reliable to be admitted.⁵¹ In *United States v. Ferri*,⁵² the Third

³⁸ In the military, the procedures for collection and preservation of evidence are detailed in Field Manual 19-20, Law Enforcement Investigations, (25 Nov. 1985). Trial defense offices should have a copy of this manual so that crime scene investigators can be effectively questioned about whether they followed proper procedures in collecting evidence. Copies may be requisitioned from the U.S. Army Adjutant General Publications Center, 2800 Eastern Boulevard, Baltimore, MD 21220-2896 using DA Form 12-11A.

³⁹ See Manual for Courts-Martial, United States, 1984, Mil. R. Evid. 402, 403 [hereinafter Mil. R. Evid. 402, 403].

⁴⁰ Moenssens and Inbau *supra* note 13, at 298.

⁴¹ See *supra* note 10 and accompanying text.

⁴² *United States v. Gipson*, 24 M.J. 246, 251 (C.M.A. 1987). Professor Gianelli stated the proposition in even stronger terms: "If the technique is not reliable, evidence derived from the technique is not relevant." Gianelli, *Admissibility of Novel Scientific Evidence*, 80 Colum. L. Rev. 1197, 1235 (1980).

⁴³ See Mil. R. Evid. 403.

⁴⁴ One serologist recognized the limited value of some tests. He observed that the traditional classification of blood into A, B, and O types have little evidentiary value because the categories are so broad. Baird, *The Individuality of Blood and Bloodstains*, 11 J. Can. Forensic Sci. 83, 103 (1978).

⁴⁵ *People v. Lauro*, 91 Misc. 2d 706, 398 N.Y.S.2d 503 (1977).

⁴⁶ *Smith v. Commonwealth*, 223 Va. 721, 292 S.E.2d 362 (1982).

⁴⁷ See *United States v. Gipson*, 24 M.J. at 253; *People v. Walker*, 199 Colo. 475, 610 P.2d 496 (1980); *State v. Baker*, 56 Wash. 2d 846, 355 P.2d 806 (1960); *State v. Gray*, 292 N.C. 270, 233 S.E.2d 905 (1977).

⁴⁸ See, *State v. Madsen* 28 Utah 2d 108, 498 P.2d 670 (1972); *Marsh v. State*, 151 Ga. App. 637, 260 S.E.2d 761 (1979); *Commonwealth v. Pedano*, 266 Pa. Super. 461, 405 A.2d 525 (1979).

⁴⁹ 293 F. 1013 (D.C. Cir. 1923).

⁵⁰ *Id.*

⁵¹ *United States v. Brown*, 557 F.2d 541 (6th Cir. 1977).

⁵² 778 F.2d 985 (3d Cir. 1985). This approach actually restates the procedure outlined in Mil. R. Evid. 402, and 403. When applied to scientific evidence, this would require a case by case assessment of each procedure.

Circuit Court of Appeals balanced the soundness and reliability of the test against the risk that it would confuse the factfinder.

Military courts have followed this balancing approach. In *United States v. Gipson*,⁵³ the Court of Military Appeals stated in *dicta* that a new scientific procedure should be reliable, relevant, and clearly explained to be admissible.⁵⁴ The Army Court of Military Review construed this test as meaning that the *Frye* standard remains a significant factor to consider.⁵⁵ This construction recognizes that the policy behind *Frye* is logical and noncontroversial. New scientific tests should have demonstrated reliability before being used in court. Consistent with this sound policy, the Court of Military Appeals has explained its position in *Gipson* as requiring the military judge to weigh the reliability of new procedure while keeping in mind that acceptance in the scientific community can be an important factor.⁵⁶

Controversy arises when courts try to assess the reliability of certain scientific tests. In many cases controversy develops when, as discussed in the introduction, courts suspend their judgment and become willing to accept the unexamined assertion of an expert that a procedure is reliable.

In accepting the assertion of an expert that a procedure is reliable, those courts abuse the language of *Frye* and assert that the standard of general scientific acceptance has been met. The fallacy of relying upon a narrow field of experts to establish general scientific acceptance was explained by Professor Gianelli.

If the 'specialized field' is too narrow, the consensus judgment mandated by *Frye* becomes illusory; the judgment of the scientific community becomes, in reality, the opinion of a few experts . . . Incredibly, several courts have cited the absence of opposing experts to support their decision to admit voiceprints, inferring reliability from a lack of opposition.⁵⁷

The Supreme Court of Michigan has also refused to accept the reliability of a procedure that has been accepted by a limited group of specialists. Commenting on the circular logic used to establish the validity of polygraph examinations, the court said:

These courts, in order to find general acceptance, found it amongst polygraphers. Once finding general acceptance, the courts then found they did not have to rely on scientific testimony, but were able to rely on the testimony of polygraphers to establish the reliability of the device.⁵⁸

The example of voiceprint identification used by Professor Gianelli, illustrates how an unanalytical application of *Frye* can lead to admission of unreliable evidence. Voiceprint identification technology was almost entirely the product of two researchers.⁵⁹ One commentator characterized the researchers as a "traveling road show" that proselytized the virtues of voiceprint identification, and "met with limited success until attorneys realized that the only 'experts' in the field were Tosi and Nash."⁶⁰

Once this realization developed, defense counsel succeeded in convincing courts to reject the admission of this unreliable evidence. The lead case, *People v. Kelly*,⁶¹ held that Nash was a partial advocate of the technique, and that reliability of a scientific procedure should be established by a neutral and detached expert. The Michigan Supreme court reached a similar conclusion.⁶²

Defense counsel must be wary of self-appointed experts. Even when individuals have credentials to give expert testimony, they may lack objectivity.⁶³ Failure of the defense to be vigilant and to carefully scrutinize scientific evidence can have serious consequences both for an individual client and for criminal accused as a class.⁶⁴ When the defense bar abdicates its duty as zealous advocates, an unreliable scientific procedure has runaway potential.

⁵³ 24 M.J. 246, 251 (C.M.A. 1987).

⁵⁴ The test was adopted from the opinion in *United States v. Downing*, 753 F.2d 1224, 1237 (3d Cir. 1985). Notice that *Gipson* explicitly discusses the role of Mil. R. Evid. 403 and 702 in assessing the reliability of scientific evidence. 25 M.J. at 251. See discussion of *United States v. Ferri* at n.53.

⁵⁵ *United States v. Rivera*, 26 M.J. 638, 641 (A.C.M.R. 1988). The opinion carefully noted that Chief Judge Everett, in a concurring opinion to *Gipson*, apparently intends to continue to use *Frye* as a significant factor to consider in determining admissibility.

⁵⁶ *United States v. Mance*, 26 M.J. 244, 248 (C.M.A. 1988).

⁵⁷ Gianelli, *Admissibility of Novel Scientific Evidence*, 80 Colum. L. Rev. 1197, 1209-10 (1980).

⁵⁸ *People v. Barbara*, 255 N.W.2d 171, 187 (Mich. 1977). Paranthetically, counsel should notice that polygraph examinations have not been accepted as reliable in military practice. The express holding of *United States v. Gipson* simply states that an accused may not be prevented, perhaps for constitutional reasons, from establishing a foundation for potential use of polygraph results. 24 M.J. at 252. In *United States v. Abeyta*, 25 M.J. 97 (C.M.A. 1987), Judge Cox, the author of *Gipson*, tolerated a military judge's reliance upon *Frye* and his refusal to admit polygraph results, and noted that, because the appellant did not testify, there was no prejudice.

⁵⁹ Bretz, *supra* note 15, at 512 cites a book written by one of the researchers which candidly admits that they testified in almost all of the seventy-five cases using voiceprint evidence.

⁶⁰ *Id.*

⁶¹ 129 Cal. Rptr. 14, 549 P.2d 1240, 1249 (1976).

⁶² *People v. Tobey*, 401 Mich. 141, 257 N.W.2d 537, 539 (1977), stating, "Neither Nash nor Tosi, whose reputations and careers have been built on voiceprint work, can be said to be impartial or disinterested." Other courts have agreed with this holding. *Cornett v. State*, 450 N.E.2d 498 (Ind. 1983); *Commonwealth v. Topa*, 471 Pa. 223, 369 A.2d 1277 (1977).

⁶³ The challenge to defense counsel is to make judges and courts sensitive to this possibility. The voiceprint example illustrates that this can be done. In military practice, there have been similar victories. With respect to handwriting analysis, the Court of Military Appeals stated, "We have not yet accepted that criminal investigators always act with the degree of impartiality that would justify admitting their findings as unexamined evidence." *United States v. Evans*, 45 C.M.R. 353, 356 (C.M.A. 1972). In *United States v. Mance*, 26 M.J. 244 (C.M.A. 1988), a defense expert was not allowed to challenge urinalysis results because he was the only proponent of a new theory.

⁶⁴ Note that some seventy-five individuals suffered adversely due to the discredited voiceprint procedure. See n.60, *supra*.

This potential has on occasion been realized. The paraffin test for discharge of a firearm is one such example.⁶⁵ Once the test was fully evaluated by independent scientists, its reliability was thoroughly discredited.⁶⁶ The test, however, which was developed in 1933, was not judicially discredited until 1959.⁶⁷ The number of convictions tainted by the paraffin test cannot be estimated.

Defense counsel should investigate the background of an expert who is advocating the reliability of a new scientific procedure. If the investigation bears fruit, counsel should question the expert on the record. Counsel should ask how much money the expert is being paid to testify, how much the company charges to perform the procedure, whether the expert has invested in the company, and whether the company or laboratory is the expert's sole source of income.⁶⁸

Repeated assertion of reliability by interested specialists does not ensure that a forensic procedure is reliable. If a repetition of the paraffin test debacle is to be avoided, courts must take care not to be swayed by apparently impressive credentials. Lawyers and judges must not only

insist on verification of a new procedure by detached and neutral sources, they must distinguish validity from reliability.

Assumptions must often be made to translate scientific theory into forensic technology. The observations made during a polygraph examination may accurately identify physiological stress reactions in a suspect, but we must make the assumption that a stress reaction is the same as a lie. The distinction between validity of a theory and its reliability caused one court to reject microprobe analysis when applied to hair samples, a field in which its reliability had never been demonstrated.⁶⁹

A scientific theory may have validity, but that does not mean it produces reliable forensic results. By itself, the issue of contamination separates forensic procedures from those in the clinically pure science laboratory. Whether or not Frye is being relied upon explicitly, the method of implementing a new scientific theory should be independently verified, and the reliability of the method as applied to specific evidence demonstrated.

⁶⁵ A paraffin cast of a suspect's hand would theoretically reveal the presence of 'blowback' particles. Moenssens & Inbau, *supra* note 13, at 184.

⁶⁶ Turkel & Lipman, *Unreliability of Dermal Nitrate Test for Gunpowder*, 46 J. Crim. L. & Criminology 281 (1955); Stone, *Evidence of Firearms Discharge Residue*, 33 Baylor L. Rev. 285 (1981).

⁶⁷ Brooke v. People, 139 Colo. 388, 339 P.2d 993 (1959). The test was first judicially endorsed in Commonwealth v. Westwood, 324 Pa. 289, 188 A. 304 (1946).

⁶⁸ These questions may be asked of any witness because motive to lie, bias, or prejudice are always legitimate inquiries. Mil R. Evid. 608(c).

⁶⁹ United States v. Brown, 557 F.2d at 577.

DAD Notes

Has the Supreme Court Changed the Rule on Preserving the Challenge for Cause of a Peremptorily Removed Court Member?

When a defense challenge for cause is denied and the defense then removes the objectionable member by peremptory challenge, counsel preserves the issue for appeal by stating on the record that had the challenge for cause been granted, the defense would have peremptorily challenged another member.¹ Recently, the United States Supreme Court decided *Ross v. Oklahoma*,² which may be interpreted as saying that as long as no objectionable party actually sits in judgment of the accused, then any wrongly denied challenge for cause is harmless error (unless it can be shown that the judge denied the challenge in bad faith to force defense counsel to exercise a peremptory challenge).³ Needless to say, it will be a rare case when any military judge would act in bad faith, and rarer still when trial or

appellate defense counsel will be able to produce any evidence of such.

In *Ross*, the trial judge denied a defense challenge for cause, and the defense used a peremptory challenge to remove the juror. The defense exercised all of its peremptory challenges, but there was no allegation that any of the jurors who actually sat were impartial or otherwise disqualified (although the defense did object that the jury had no black representation).⁴ On appeal, it was conceded that the denial of the challenge for cause was error.⁵ The Supreme Court, however, found "the error did not deprive petitioner of an impartial jury or of any interest provided by the State."⁶

Close scrutiny of *Ross* reveals it may have little impact in courts-martial. The Court in *Ross* relied heavily on what it termed "a long settled principle of Oklahoma law."⁷ Specifically, under Oklahoma law, in order to preserve a denied

¹ Manual for Courts-Martial, United States, 1984, Rule for Courts-Martial 912(f)(4) [hereinafter R.C.M.].

² 56 U.S.L.W. 4676 (June 22, 1988).

³ *Id.* at 4679 n.5.

⁴ The Court did not find this objection relevant, and merely noted that it had not been claimed that the absence of blacks from the jury related to the issue of whether the challenge for cause had been preserved. *Id.* at 4677.

⁵ *Id.*

⁶ *Id.* at 4678.

⁷ *Id.*

challenge for cause, the defendant must use any available peremptory challenge to remove the juror, and even then, no reversible error occurs unless "an incompetent juror is forced upon him."⁸ Because military practice, in contrast to Oklahoma law, provides a different and specific mechanism for preserving a challenge for cause, Ross appears inapposite to courts-martial.⁹ Indeed, it can be argued that the military's method of preserving the challenge for cause should be afforded the same deference Ross affords the Oklahoma rule. Thus, Ross should not be viewed as changing the military's practice with regard to preserving the issue for appeal. Further, the aspect of Ross dealing with the question of prejudice resulting from the erroneous denial of the challenge for cause was also keyed to the principles of Oklahoma law. Therefore, that portion of the Ross decision should also be viewed as inapposite to courts-martial.

The Court in Ross specifically found that peremptory challenges in Oklahoma are "qualified by the requirement that the defendant must use those challenges to cure erroneous refusals by the trial court to excuse jurors for cause."¹⁰ As military practice has no analogous limitation or qualification on the exercise of a peremptory challenge, its use to cure an error by the military judge automatically means the accused has been denied a substantive right, i.e., the free and full use of the peremptory challenge. Thus, in the military, if a challenge for cause is erroneously denied and defense counsel then peremptorily removes the member in question (and properly preserves the challenge), it should be viewed as a *per se* prejudicial error requiring reversal.

Defense counsel are reminded that when they peremptorily challenge a court member after a challenge for cause of that same member has been denied, they should continue to preserve the challenge by stating that another member would have been peremptorily removed had the challenge for cause been granted. Given the tone of Ross, defense counsel would be well advised to specify which court member they would have peremptorily challenged and state their reasons. Even if the reasons do not support a challenge for cause, they can serve as a basis to argue specific prejudice on appeal, and possibly rebut an attempt by the government to use Ross to urge the appellate courts to apply a harmless error analysis. Captain James E. O'Hare.

ACMR Gets in its Licks in Hicks

The Army Court of Military Review has recently held in *United States v. Hicks*,¹¹ that it was error for an accused to be sentenced, *inter alia*, to total forfeitures and confinement for four months, even though the execution of the period of

confinement was suspended for one year. The error cited by the court originated in the pretrial agreement that, of course, was initiated by the accused and his trial defense counsel.

On 24 February 1988, Specialist Ronald Hicks was convicted of larceny. He was sentenced by the military judge to a bad-conduct discharge, confinement for four months, total forfeitures, and reduction to Private E-1. Pursuant to a pretrial agreement, the convening authority approved the sentence but suspended execution of the confinement for one year. The accused's pretrial agreement provided, *inter alia*, that "in the event a punitive discharge was adjudged, the convening authority would approve no sentence in excess of a bad-conduct discharge, confinement as adjudged, with all confinement to be suspended for a period of one year, forfeiture of all pay and allowances, and reduction to the grade of Private E-1."¹² The accused further agreed that he would immediately request to be placed on voluntary excess leave, but that his status would be converted to involuntary excess leave once his punitive discharge was approved. The obvious thrust of the pretrial agreement was to keep the accused out of jail. The provision of the agreement relating to immediate application by the accused for excess leave was apparently to satisfy the government that the accused would be receiving no military pay while awaiting the appeal of his case and the issuance of his discharge.¹³ The Court determined, however, that sentencing an accused to forfeiture of all his pay and allowances while serving a suspended sentence to confinement was contrary to Department of Defense policy, the Manual for Courts-Martial, and applicable case law.¹⁴

It is important to note that the Army Court of Military Review apparently would have honored the terms of accused's pretrial agreement, notwithstanding public policy, the manual, and case law, if the military judge had queried the accused more thoroughly regarding his understanding of the provisions. The court was fully cognizant of the provision in the Manual for Courts-Martial that states: "[w]hen an accused is *not serving confinement*, the accused should not be deprived of more than two-thirds pay for any month as a result of one or more sentences by court-martial . . . unless requested by the accused."¹⁵ The court, however, could not determine from the record that, by the terms of the agreement, the accused was "requesting" permission to remain on active duty in a non-pay status in the event he would be called back to active duty. Because the desires of the accused were not clear, it was incumbent upon the military judge not only to determine whether the accused was making a "request" within the meaning of the manual, but

⁸ The Court itself noted that it was not deciding the broader question of whether, in the absence of the Oklahoma rule, relief would lie. See *id.* at 4677 n.4. It is likely that the narrowness of the opinion reflects a split in the Court. The case was originally argued on January 19, 1988, and subsequently reargued on April 18, 1988, with the resulting 5 to 4 opinion by the Chief Justice joined in by Justice Kennedy (who had in the interim assumed his seat on the Court).

⁹ To preserve the issue for review in the military, the defendant may use the peremptory challenge against *any* member, while the Oklahoma law required the use of the peremptory challenge to remove the juror against whom the challenge for cause was raised. See R.C.M. 912(f)(4).

¹⁰ *Id.* at 4678.

¹¹ ACMR 8800379 (A.C.M.R. 16 Aug. 1988).

¹² *Id.*, slip. op. at 1.

¹³ Department of Defense Military Pay and Allowances Entitlements Manual, para. 10306, provides that servicemembers who are on excess leave are not entitled to pay and allowances.

¹⁴ *Hicks*, slip. op. at 3 and 6.

¹⁵ *Id.*, slip. op. at 3 (emphasis in the original), citing Manual for Courts-Martial, United States, 1984, Rule for Courts-Martial 1107(d)(2) discussion.

also to explain the ramifications of such a request to the accused.¹⁶ The court further held that before a provision in a pretrial agreement will be construed as a request by an accused for total forfeitures while not serving confinement, there will have to be "an adequate explanation on the record, and an express acknowledgment by an accused of his understanding of the effect of such a request and whether he intended the consequences thereof."¹⁷ Because the court was not satisfied that the accused fully understood the ramifications of his agreement, it held that it was error for the convening authority to approve total forfeitures when the accused's sentence to confinement was suspended. Therefore, the court affirmed forfeiture of only \$447.00 per month for four months.¹⁸

Naturally, in cases where their clients are going to enter guilty pleas at trial, it is always advisable for defense counsel to initiate pretrial agreements that represent their clients' interests. Sometimes, clients' interests can best be represented by artful and innovative pretrial agreement provisions. The point of the *Hicks* case is that where a provision of a pretrial agreement is in contravention of public policy, case law, or the Manual for Courts-Martial, the defense counsel should ensure that the judge explains the ramifications of the provision to the accused on the record, and obtains an express acknowledgment by the accused of his understanding and intent of the consequences of his request. In this manner, defense counsel will ensure that the spirit and intent of the client's pretrial agreement will be upheld on appeal. Captain Wayne D. Lambert.

Falling on Sword Fails

What happens when, upon post-trial reflection, trial defense counsel is concerned that both his pretrial preparation and his performance in the courtroom did his client a disservice, to the point that trial defense counsel accuses himself of ineffective assistance of counsel in his post-trial matters? Such a case was recently decided by the Army Court of Military Review.¹⁹ In *United States v. Tillery*, trial defense counsel submitted a petition for clemency in which he berated his own failure to prepare the accused adequately for trial and his failure to object at trial to inadmissible testimony concerning nonjudicial punishment that the accused had received.²⁰

The Army court was not as harsh on trial defense counsel as he was on himself. The court decided, upon reviewing the record of trial and a post-trial affidavit, that trial defense counsel's performance did not meet the standards for ineffective assistance of counsel set down in *Strickland v. Washington*.²¹

The court also discussed the failure of the staff judge advocate to comment on trial defense counsel's self-directed allegations of ineffective assistance and on the possibility that trial defense counsel's interests may have conflicted with those of the accused, given the allegations of ineffective assistance.²² The court stated that when the issue of ineffectiveness arose, the staff judge advocate should have either sought assurances that no conflict of interest existed, or made arrangements to have the post-trial recommendation resubmitted to a different defense counsel.²³ Because the court found no ineffective assistance or actual conflict of interest, the case was not returned for a new recommendation and action.²⁴

The Army court's decision in *Tillery* should be both a relief and a disappointment to trial defense counsel. On the one hand, counsel try strenuously to avoid allegations of ineffective assistance of counsel. But once deciding to "fall on the sword" and accept responsibility for what counsel believes was deficient representation, it is a hollow victory indeed when the court finds no error. Captain Lida A.S. Savonarola.

When Is An Officer "Out of the Woods?"

The Court of Military Appeals recently held that a timely tender of an officer's "Resignation in Lieu of Court-Martial" that is ultimately approved after the officer is convicted and sentenced, acts to abate the case. In *United States v. Woods*,²⁵ Captain Woods was served with referred charges alleging drunk and reckless driving and involuntary manslaughter on 30 October. On 9 November, CPT Woods submitted his request for resignation in lieu of court-martial.²⁶ He was tried and convicted on 11 December. The general court-martial convening authority took action on 7 February and on the same day, forwarded CPT Woods' request for resignation, recommending disapproval. On 2 April, the request for resignation was approved.

¹⁶ *Id.*, slip op. at 4.

¹⁷ *Id.*, slip op. at 5.

¹⁸ *Id.*, slip op. at 6 (the court also affirmed accused's sentence, which provided for a bad-conduct discharge, confinement for four months (as suspended by the convening authority), and reduction to Private E-1).

¹⁹ *United States v. Tillery*, 26 M.J. 799 (A.C.M.R. 1988).

²⁰ *Id.* at 799.

²¹ *Id.* at 800; *Strickland v. Washington*, 466 U.S. 668 (1984). The Army court also cited *United States v. Babbit*, 26 M.J. 157 (C.M.A. 1988), in denying relief on the issue of ineffective assistance of counsel. In *Babbit*, the Court of Military Appeals held, *inter alia*, that the appellant in that case was not denied effective assistance of counsel just because she had engaged in sexual intercourse with her civilian defense counsel the evening before the final day of her court-martial. *Babbit*, 26 M.J. at 158-9. The Court of Military Appeals agreed with the court below that, if anything, appellant's sexual activity with her counsel "spurred on" the defense counsel's attention to her case. *Id.* at 159.

²² 26 M.J. at 800.

²³ *Id.*

²⁴ *Id.*, citing *United States v. Ghiglieri*, 25 M.J. 687, 690 (A.C.M.R. 1987). The *Ghiglieri* issue, i.e., if the underlying legal issue raised in Manual for Courts-Martial, United States 1984, Rule for Courts-Martial 1105 matters has no merit, then a staff judge advocate's error in not addressing those matters is harmless, has been granted for review by the Court of Military Appeals. *United States v. Flynn*, ACMR 8700444, Docket No. 59,576/AR, *pet. granted* (C.M.A. 26 July 1988).

²⁵ 26 M.J. 372 (C.M.A. 1988).

²⁶ Army Reg. 635-120, Personnel Separations: Officer Resignations and Discharges (8 Apr. 1968) (C16, 1 Aug. 1982).

The Court of Military Appeals determined that the Army court erred in concluding that while the Secretary of the Army had the power and authority to grant Woods clemency and discharge him administratively under other than honorable conditions, such action did not abate the general court-martial proceedings. The Court of Military Appeals held that a court-martial cannot defeat a lawful agreement between an accused and the Secretary of the Army.²⁷ In his concurring opinion, Chief Judge Everett concluded: "We do not hesitate to set aside a court-martial

action which violates a pretrial agreement. By the same token, we should not hesitate to set aside this court-martial conviction which conflicts with the agreement implicit in the acceptance of appellant's resignation."²⁸

Defense counsel should be aware of this holding and ensure that officer clients continue to seek administrative remedies even if trial by court-martial seems inevitable.²⁹ Captain William Kilgallin.

²⁷ Woods, 26 M.J. at 375.

²⁸ *Id.*

²⁹ The court highlighted the need for an accused to comply fully with the regulation. Woods, 26 M.J. at 374.

Trial Defense Service Note

Defending Against the "Paper Case"

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Introduction

Any attorney who has practiced at a post with a Personnel Control Facility (PCF) has probably been exposed to some variation of the following scenario. A soldier is returned to military control after an extended absence, and the soldier's chain of command wants to begin prosecution. Typically, at the time of the absence, the soldier was under investigation (or possibly charges) for a serious offense, but there is some barrier to prosecution of the soldier for that offense. Because absence without authority now tolls the statute of limitations,¹ the problem is usually the inability of the government to locate witnesses or evidence. The government is left with the option of taking no punitive action at all or proceeding to court-martial solely on the absence charge.² Because an absence offense can be proven without live testimony, the chain of command often opts for court-martial.

The defense attorney is faced with the unenviable task of preparing to defend a client in a case without witnesses. The government does not need to call any witnesses to prove their case. The accused cannot take the stand without being cross-examined about the absence or the uncharged misconduct; counsel does not want to force the accused to invoke the right to remain silent. Or worse still, the evidence the government presents contains patently false information, but too much time has passed to find the witnesses necessary to prove its falsity. The defense's only hope

of acquittal is that the trial judge will not admit into evidence the documents that prove the accused was absent without leave.

This article will focus on impediments to the admissibility of those documents usually relied upon by the government in AWOL and desertion cases. It is meant to aid defense counsel in their attempt to keep these documents from being admitted into evidence. Because the same hearsay exceptions and principles of jurisprudence arise in a number of "paper cases," the discussion should help to provide an analytical and a strategic framework for dealing with a number of evidentiary issues. It is also a plea for well-reasoned appellate court guidance concerning these issues.

Discussion

In the typical paper AWOL case, the form used to prove the government's case is a Department of the Army Form 4187. This form has a number of uses that are completely unrelated to absence offenses.³ Even in the case of an AWOL soldier, the form serves a number of non-prosecutorial purposes. Of these, the most important is related to pay. Four copies of the form are prepared in the case of a duty status change. Copy 2 goes to the Finance and Accounting Office (FAO); the U.S. Army Deserter Information Point (USADIP) will eventually end up with a copy of the 4187 some thirty-two days after an unauthorized absence begins.⁴ As will be discussed later, it is

¹ Uniform Code of Military Justice art. 43(c), 10 U.S.C. § 843(c)(1982) [hereinafter UCMJ].

² If the absence began prior to November 1986, the effective date of the new statute of limitations, the charge will typically be simple AWOL because that is typically the charge preferred by commanders of soldiers who are dropped from the rolls of their unit. Preferral of charges, of course, tolls the statute of limitations.

³ Most typically, DA Form 4187 is used to request favorable personnel action, such as assignment to special schools or payment of advance leave.

⁴ See Dep't of Army, Pam. 600-8, Management and Administrative Procedures para. 9-4, Procedures 9-1, Step 3 (1 Aug. 1986) [hereinafter DA Pam 600-8].

important to keep these facts in mind when challenging the admissibility of a 4187 in an individual client's case.

In the typical AWOL paper case, the government will seek admission of certified copies of the 4187's, indicating the inception date and termination date of the accused's absence, under the public records hearsay exception.⁵ This exception permits admission of 4187's as records setting forth "matters observed pursuant to duty imposed by law as to which matters there was a duty to report. . . ." "Personnel accountability documents" are listed in the text of the rule itself as one category of documents within the public records exception, despite their apparent law enforcement purpose. By taking advantage of the self-authentication provisions of Military Rule of Evidence (M.R.E.) 902, the need for live testimony would appear to be completely eliminated. Despite these provisions, an individual 4187 is not necessarily an admissible public document.

The regulatory provisions governing the preparation of 4187's in AWOL cases are numerous and confusing.⁶ Whether because of the complexity of the applicable regulations, or for some other reason, many 4187's in AWOL cases were not prepared in compliance with the applicable regulatory provisions. The most common oversight is the failure of the unit commander to verify the information contained in the 4187 (or at least to check the "has been verified" box in Section V of the form). One would suspect that a thorough investigation, when feasible, would disclose additional instances of noncompliance, but (in the author's experience) this is rarely necessary.

The question for defense counsel, then, is how to use this noncompliance to prevent admission of 4187's in an individual case. The place to start is the wording of the public records exception itself. M.R.E. 803(8) indicates that public documents are not admissible under that rule unless they were observed by someone with a "duty to report." Defense counsel can safely assume that any soldier below the rank of E-6 does not have a duty to report, and higher ranking soldiers may not have a duty to report unless specifically authorized by their commander.⁷ This was the case in

United States v. Williams.⁸ A soldier who was not authorized to verify the information contained in 4187's acted as "verifier" of the documents that established that Williams was absent without leave. The trial judge sustained an objection under Rule 803(8) on the ground that the documents were not prepared "by a person within the scope of the person's official duties."⁹ (The judge did, however, admit the disputed 4187's on grounds that will be discussed later in this article).

More commonly, a 4187 is signed by a person authorized to verify the information contained therein, but there is no indication on the 4187 whether that information has in fact been verified. In such a case, the plain language of M.R.E. 803(8) does not appear to impose a blanket prohibition on admissibility, unless one interprets the "lack of trustworthiness" language usually associated with M.R.E. 803(8)(c) as applicable to M.R.E. 803(8)(b) as well. Such an interpretation is impliedly rejected in the analysis of M.R.E. 803(8),¹⁰ but such an interpretation would make the present rule more consistent with the old official records exception set forth in Paragraph 144b of the 1969 Manual for Courts-Martial.¹¹ Because 4187's are "personnel accountability documents," they must be made by a person acting within the scope of his duty to "know or ascertain through appropriate and trustworthy channels of information the truth" of the act or event recorded in order to be admissible under M.R.E. 803(8). This same language in the old Manual led the Army Court of Military Review to conclude in *United States v. McCullers*, that a 4187 that did not indicate that the information recorded therein had been verified was inadmissible.¹²

The court stated:

Where, on its face, the form is incorrectly completed according to the regulation, the government is not aided by any inference that the record was made by an authorized person and that person performed his duty properly. To the contrary, the only inference to be drawn from such noncompliance is either that he was ignorant of the requirements of the regulation or that he chose to violate them. Either, because they touch

⁵ Manual for Courts-Martial, United States, 1984, Mil. R. Evid. 803(8) [hereinafter M.R.E. 803(8)]. The text of the rule is as follows:

Public records and reports. Records, reports, statements, or data compilations, in any form, of public office or agencies, setting forth (A) the activities of the office or agency, or (B) matters observed pursuant to duty imposed by law as to which matters there was a duty to report, excluding however matters by police officers and other personnel acting in a law enforcement capacity, or (C) against the government, factual findings resulting from an investigation made pursuant to authority granted by law, unless the sources of information or other circumstances indicate lack of trustworthiness. Notwithstanding (B), the following are admissible under this paragraph as a record of a fact or event if made by a person within the scope of the person's official duties and those duties included a duty to know or to ascertain through appropriate and trustworthy channels of information the truth of the fact or event and to record such fact or event: enlistment papers, physical examination papers, outline figure and fingerprint cards, forensic laboratory reports, chain of custody documents, morning reports and other personnel accountability documents, service records, officer and enlisted qualification records, records of court-martial convictions, logs, unit personnel diaries, individual equipment records, guard reports, daily strength records of prisoners, and rosters of prisoners.

⁶ The regulation governing the investigation and "verification" of alleged absence offenses is Army Reg. 630-10, Absence Without Leave and Desertion (1 July 1984) [hereinafter AR 630-10]. DA Pam 600-8 governs the procedure to be followed in preparing 4187's and the other necessary forms in AWOL cases. Army Reg. 680-1, Unit Strength Accounting and Reporting, para. 16 (1 June 1982) [hereinafter AR 680-1] governs who may verify the information reported in sections II and IV of DA Form 4187. Army Reg. 190-9, Military Police, Military Absentee and Deserter Apprehension Program (15 July 1980) [hereinafter AR 190-9] governs the preparation of still more forms.

⁷ See DA Pam 600-8, para. 9-4d(7).

⁸ 12 M.J. 894 (A.C.M.R. 1982).

⁹ *Id.* at 896.

¹⁰ Manual for Courts-Martial, United States, 1984, Mil. R. Evid. 803 analysis, app. 22, at A22-50 [hereinafter cited as M.R.E. 803 analysis].

¹¹ Manual for Courts-Martial, United States, 1969 (Rev. ed.), para. 144b.

¹² 7 M.J. 824 (A.C.M.R. 1979).

upon verification of the truth of the fact reported, is fatal.¹³

As previously noted, *McCullers* was decided under paragraph 144b of the 1969 Manual, which was a codification of the official records hearsay exception and is not identical to M.R.E. 803(8). Before discussing how the old rule affects the new, however, it is necessary to examine the court's interpretation of paragraph 144b.

The old rule was interpreted to require substantial compliance with applicable regulations before a document could be admitted as an official record. Minor deviations and omissions were tolerated, but not those that were "material to the execution of the documents."¹⁴ The court in *McCullers* failed to provide much of an analytical framework to assist in determining when a deviation or omission is "material," but the result of the case provided practical guidance in determining when an improperly prepared 4187 would be admissible under paragraph 144b. The court held that 4187's that did not have the "has been verified" box checked were not admissible, but that two 4187's that erred only by stating that the accused was "present for duty" instead of "attached", were admissible. The variation in language was not "material" because "present" and "attached" were simply two ways of stating the same fact: that the individual was under military control.¹⁵ Where other deviations from regulation fall on the materiality spectrum is a matter of conjecture because there is little case law on point. Defense counsel should assert the application of precedent decided under the old rule in determining materiality issues under the new rule. The author is aware of no case specifically holding that M.R.E. 803(8) is to be interpreted consistently with paragraph 144b. It would be surprising to find such a case because M.R.E. 803(8) is clearly intended to admit evidence that would not be admissible under paragraph 144b. Paragraph 144b did not have any provision equivalent to M.R.E. 803(8)(c), the provision allowing admission of factual findings against the government. That does not mean, however, that to the extent their provisions are consistent, they should not be interpreted consistently. The author of the Analysis of the Military Rules of Evidence opined that because "the modifications to subdivision (8) dealing with specific records (e.g. personnel accountability documents) retains the present Manual language, it is particularly likely that present case law will survive in this area."¹⁶

The author adds that the specific question of whether noncompliance with regulation renders a document inadmissible under M.R.E. 803(8) was not addressed by the committee tasked with drafting the new rules.¹⁷ The fact that the drafters incorporated the language of the old rule into those provisions which they added to Federal Rule of Evidence 803(8) seems to indicate that the new rule was not

intended to affect a change in the law, other than that expressly provided for in M.R.E. 803(8)(c). Certainly, this is true of those documents specifically listed in M.R.E. 803(8).

If the trial court is not persuaded by these arguments, there are constitutional issues that merit consideration. If the old case law does not apply to M.R.E. 803(8), then M.R.E. 803(8) would not be a "firmly rooted" hearsay exception, meaning that admission of a formerly inadmissible record under 803(8) would violate an accused's sixth amendment right to confrontation.¹⁸ In *United States v. Broadnax*, the Court of Military Appeals reversed a conviction based upon evidence admitted under M.R.E. 803(8) by concluding that 803(8) was either no more broad than its predecessor, or, to the extent the new rule is broader than the old, the new rule requires further confrontation clause analysis.¹⁹ Confrontation is an issue that defense counsel should be prepared to raise in any paper case.

Due process is another issue that might merit consideration if the aforementioned arguments fail. There is something disquieting about allowing an accused to be found guilty beyond a reasonable doubt based solely on evidence which is not of unquestionable reliability. If a defense counsel is going to succeed at the trial level in preventing a public record from being admitted, it will probably be on one of the previously mentioned grounds, although due process is an area worthy of research and advocacy.

If defense counsel succeeds in an objection based on M.R.E. 803(8), trial counsel will probably seek to have the challenged 4187 admitted under M.R.E. 803(6). A.C.M.R. approved admission of two 4187's under M.R.E. 803(6) in *United States v. Williams*.²⁰ The case is of limited precedential value because of the unusual fact pattern, but, even given the unusual facts, the case is almost certainly incorrectly decided. The disputed 4187's were apparently prepared and "verified" by an individual whose rank precluded him from verifying the information contained in the document. He was an E-6 and the applicable regulation at the time of preparation required verification by individuals in the grade of E-7 or above.²¹ After the trial judge refused to admit the 4187's under M.R.E. 803(8), the prosecution called the chief legal clerk of the local personnel control facility (PCF) to attempt to lay the foundation for admission under M.R.E. 803(6). The clerk testified that he was familiar with the preparation of 4187's and with the regulations governing their preparation. He identified the disputed documents as the ones from the accused's former unit, and he must have testified that the 4187's were prepared properly and in the regular course of business except for the fact that the verifying authority was of unauthorized rank. The trial judge who heard the case and A.C.M.R. ruled that the foundation was sufficient to support admission under M.R.E. 803(6).

¹³ *McCullers*, 7 M.J. at 825. Note the "either . . . or" language. It is common in M.R.E. 803(8) cases. In this case, the court also overlooked the fact that there cannot be two "only" inferences.

¹⁴ See *United States v. Anderten*, 15 C.M.R. 354 (C.M.A. 1954).

¹⁵ *McCullers*, 7 M.J. at 825.

¹⁶ M.R.E. 803 analysis, at A22-50.

¹⁷ *Id.*

¹⁸ See *Ohio v. Roberts*, 448 U.S. 56, (1980) and *United States v. Broadnax*, 23 M.J. 389 (C.M.A. 1987).

¹⁹ *Broadnax*, 23 M.J. at 393.

²⁰ *Williams*, 12 M.J. at 897.

²¹ See Army Reg. 680-1, Personnel Information Systems, Morning Report, Reports Control Symbol AG-140, para 5-9f (11 Sep. 1969) (C8, 21 Feb. 1975).

It should be noted that the applicable regulation had been changed to authorize E-6's to verify 4187's *before* the case was decided.²² This, more than anything else, serves to explain the court's decision. It is *not* a sufficient foundation to establish that 4187's are *generally* prepared and maintained in the regular course of business. In order for an individual business record to be admitted into evidence, the party seeking admission must establish through competent testimony that the particular record comes within the exception.²³

It is difficult to imagine how a legal clerk at one installation can competently testify that a 4187 from another installation was made "by, or from information transmitted by, a person with knowledge." Remember, people are incompetent to testify as to matters about which they lack "personal knowledge."²⁴ The legal clerk at the PCF almost certainly lacked personal knowledge as to the method of preparation of the disputed 4187's in *Williams*, so his testimony could *not* serve to lay a proper foundation for admissibility under M.R.E. 803(6).

Should prosecutors cite *Williams* to justify admission of 4187's under M.R.E. 803(6) despite their inability to establish the foundation mandated by the plain language of the rule, defense counsel should be prepared to raise the issues of trustworthiness and confrontation, neither of which were addressed by the court in *Williams*. M.R.E. 803(6) precludes admission of documents if "the source of information or the method of circumstances of preparation indicate lack of trustworthiness." Relying on the court's reasoning in *McCullers*, defense counsel should argue that any material deviation from regulation mandates the inference that the record is not trustworthy. A trial judge who refuses to accept that reasoning is effectively expanding the new hearsay rules beyond the bounds of the old. According to the Court of Military Appeals, such an expansive interpretation of hearsay rules requires further confrontation clause analysis.²⁵

Even if a defense counsel does succeed in keeping an improperly prepared 4187 from being admitted into evidence, the trial counsel may attempt to introduce other documents in place of the inadmissible one. DA Pam 600-8 provides two procedures that could be employed to produce such a document. One allows for the correction of a previously submitted 4187 and the other provides a means to create a retroactive 4187 to document a duty status change that was never reported.²⁶ The latter provision is rarely available in lengthy AWOL cases because the duty status change is almost always reported. 4187's prepared under that provision are easy to dispose of. Such a document is "based upon the best obtainable information." This implies a level of care and accuracy something less than "know(ing) or ascertain(ing) through appropriate and trustworthy channels the truth . . .," the standard set forth in M.R.E. 803(8). As mentioned near the beginning of this article, 4187's serve a number of nonevidentiary purposes, the most important of

which are financial and strength accountability. A retroactive 4187 can serve its financial and strength accountability purposes without being sufficiently trustworthy to warrant its admission under M.R.E. 803(8) or 803(6).

Whether a "corrected" 4187 is admissible is a more complicated question. The decision in an individual case may well turn on when, how, and by whom the form was prepared. If the "corrected" 4187 was prepared and verified by authorized individuals, soon after the time of the original error, and the verifying official could actually conduct an inquiry sufficient to truly verify the information contained therein, there is little reason not to admit the corrected document. In such an instance, the 4187 is much like a correction memorandum to a chain of custody. Chains of custody with correction memoranda are routinely admitted into evidence. (In a contested case, however, defense counsel may wish to argue that the fact that a correction was necessary destroys any presumption of trustworthiness or administrative regularity a properly prepared 4187 might have, and demand, as a minimum, live testimony to establish that the information contained in the document is trustworthy). More commonly, there will be no "corrected" 4187 prepared until the absent soldier is returned to military control. If the absence was a long one, most often the persons who prepared the original 4187 have PCS'ed or ETS'ed and are difficult to locate. Unless the accused volunteers any missing or incorrect information, or the original error was merely typographical, it will be difficult to accurately correct any incorrect entries.

In most instances the item that needs "correcting" does not concern the accused at all: usually the error is a failure to verify the information contained in the 4187. Can an unverified 4187 be corrected? The prosecutor may claim that it can. Although the correction provision was designed to correct or delete erroneous "duty status change(s)," DA Pam 600-8 states that "all items on a DA Form 4187" may be corrected.²⁷ Because the verification block is an "item" on the form, the argument goes, it can be corrected by this procedure. Such an interpretation of the provision ignores the plain meaning of the provision governing corrections, as well as the workings of the real world. The instruction and the examples given in the rest of the provision indicate that the provision was designed to correct erroneous *duty status changes*, not to correct procedural oversights. The correction procedure also requires verification and signature. This indicates that verification is something different than the items in the other sections of a 4187, and cannot simply be corrected or deleted. The other items in Section V of a 4187 relate to a commander's approval or disapproval of a requested personnel action. No one would argue that a battalion PAC supervisor could "correct" a commander's recommendation months or years after the fact. How can such a person correct a predecessor's failure to verify previously recorded information?

Even if the correction provision is interpreted to allow a successor commander or PAC supervisor to "correct" a

²² See Army Reg. 680-1, Personnel Information Systems, Unit Strength Accounting and Reporting, para. 2-3a(1) (1 Oct. 1978) (IO 104, 17 July 1981).

²³ See M.R.E. 803 analysis, at A22-49.

²⁴ M.R.E. 602.

²⁵ *Broadnax*, 23 M.J. at 393.

²⁶ DA Pam 600-8, para. 9-4, Steps 8 and 9.

²⁷ DA Pam 600-8, para. 9-4, Step 8.

predecessor's failure to verify a duty status change, as a practical matter, such a correction simply cannot be done. A successor who calls USADIP will discover the USADIP has the individual listed as a deserter based on the unverified 4187 that needs correction. The same result would occur if one checked with the finance office or with the enlisted records branch. Each of these offices act on unverified 4187's. There is rarely any reliable way to verify the accuracy of the information contained in an old 4187, because it is the document relied upon by all military offices and agencies that keep records on a servicemember. If the information cannot be properly verified, then a successor commander can do little but offer an opinion as to the truthfulness of the information contained in the improperly prepared 4187. Such an opinion is clearly inadmissible.

In some instances, there may be evidence in the servicemember's records that an inquiry into the servicemember's duty status was conducted. Should presentation of this evidence to the judge be sufficient to cure a failure to indicate that the duty status change has been verified? In determining whether to admit evidence the judge could in theory use such evidence to conclude that the information contained in the 4187 was "ascertain(ed) through appropriate and trustworthy channels," as required by M.R.E. 803(8). Such an interpretation of the rules would seem logical and would seem to strike a balance between the government's need to have some means to present its case, the accused's right to confrontation, and society's concern for accurate administration of justice.²⁸ (Accuracy is a legitimate concern in more than an abstract sense: the author has had several clients whose 4187's contained inaccurate or arguably inaccurate information). Such an interpretation, however, would require the resolution of a number of issues that defense counsel may not wish to concede.

The first is the accused's sixth amendment right to confrontation. If admission of a 4187 would require an expansion of a traditional hearsay exception, then there remains a confrontation issue. A more difficult problem is how to determine how much and what type of evidence is necessary to cure a defect in a 4187. Among the items which may be available are charge sheets, a DD Form 553 (Deserter/Absentee Wanted by the Armed Forces), DA Form 4384 (Commander's Report of Inquiry/Unauthorized Absence), and copies of letters to next of kin.²⁹ If a commander attempted to follow the applicable regulations, he should have generated these documents at a minimum. There is no guarantee, however, that these documents are any more accurate than the 4187. DD Form 553 is verified against the 4187,³⁰ so it will simply repeat any errors made in the original document. USADIP will "verify" the information in a DD Form 553 before entering the 553 in to the

National Crime Information Center.³¹ USADIP will contact sources of information that will also have acted on 4187's, however, so USADIP may merely serve to amplify the errors that have already been made.

Surely the charge sheet cannot serve to cure any defects in a 4187. That would allow the mere fact that an individual is accused serve as the basis for conviction. Such a prospect raises a number of constitutional issues.

If any document could serve to cure an error in a 4187, it would be DA Form 4384. This form is designed to reflect the results of a commander's inquiry into a servicemember's actual duty status, reasons for absence, and possible whereabouts. If a 4187 and a 4384 report the same information, the reliability of the 4187 would appear to be bolstered. One could just as easily infer, however, that a commander who took short cuts in preparing the 4187 probably took short cuts in preparing the 4384. (The author has had at least two clients with matching 4187's and 4384's that either contained inaccurate information or which on their face gave evidence that they were not prepared in compliance with applicable regulations). How a judge can choose between competing inferences without live testimony is unclear; there is always the confrontation issue that must be resolved if a judge attempts to. This is an area that is ripe for litigation and in desperate need of appellate court resolution of the hearsay, confrontation, and due process issues raised by these paper cases.

Conclusion

Under the old hearsay rules, unverified 4187's and other 4187's with errors that were "material to the execution" of the document were not admissible as official records. Under the new Military Rules of Evidence, a 4187 was admitted under 803(6) as a business record. This result is inconsistent with the plain language of M.R.E. 803(6), and should have no precedential value as long as defense counsel are prepared to make timely and proper objection to admission. There is no other case law on the issue of admissibility of improperly prepared 4187's under M.R.E. 803(8). The fact that the language of the old rule was grafted into the new public records rule indicates that the new rule is no more expansive than the old (insofar as it relates to 4187's). This conclusion is bolstered by the requirements of the confrontation clause. It would be reasonable to conclude that a defect in a 4187 could be cured by extrinsic evidence of the document's accuracy. This raises still more issues, however. The appellate courts have been hesitant to give principled guidance in this area, preferring to make "either-or" decisions. Defense counsel must therefore be prepared to argue alternate reasons for the desired outcome.

²⁸ This was the Court of Military Appeals' approach in *Broadnax*, 23 M.J. at 394.

²⁹ See AR 190-9 and AR 630-10, App. B.

³⁰ AR 190-9, para. 3-2c.(4).

³¹ AR 190-9, para. 3-2d.

The DNA "Fingerprint": A Guide to Admissibility

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Introduction

News of a forensic identification tool is sweeping the field of criminal investigation and prosecution. This tool—known as the DNA "fingerprint" test—can confirm with near certainty whether blood, semen, or other bodily tissue found at the scene of a crime was deposited there by the suspect.

At this writing, DNA "fingerprint" evidence has not been introduced as direct evidence of identity at a contested trial by court-martial. It is only a matter of time before the opportunity to do so presents itself.

The trial counsel to whom this opportunity is presented must understand the principles and procedures of the DNA "fingerprint" test, and the standards for its admission at court-martial. There must be an understanding of the test's strengths and weaknesses and its use to date. The purpose of this article is to provide military trial counsel with this information, and to present them with a guide to admissibility of DNA "fingerprint" evidence.

The Science

To understand the DNA "fingerprint" test, one must understand the science behind the test—genetics. The starting point is the cornerstone of this science—Deoxyribonucleic Acid, or DNA.

DNA: The Building Block of Life

"Human cells contain within them all of the information needed to produce a complete human body. This human

blueprint is carried in discrete packets of information known as chromosomes, and the material of which they are made is called DNA."¹

DNA—deoxyribonucleic acid—is the building block of life.² It is the material that carries a person's genetic code of individuality.³ DNA is housed in virtually every cell of the human body as a three-foot-long chemical strand. No two living creatures—except identical twins—are genetically exact due to the unique DNA makeup.⁴

Large segments of a cell's DNA form genes, the "functional units of heredity,"⁵ which are located at specific sites along the chromosome.⁶ Each nucleated cell contains 46 chromosomes organized into 23 pairs.⁷ At the time of fertilization, one half of these chromosomes originate maternally, and the other half paternally. The sperm cell and the ovum each carries 23 chromosomes; therefore, when these sex cells combine, the result is 23 pairs of chromosomes.⁸

DNA is formed by a double strand, or "helix," made up of nucleotide molecules.⁹ One strand originates from each parent.¹⁰ The nucleotide molecules are composed of a five carbon sugar, a phosphate group, and one of four organic bases: thymine, adenine, cytosine, and guanine.¹¹ Nucleotide molecules that are linked together by sugar/phosphate

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¹ Kelly, Rankin, & Wink, *Method and Applications of DNA Fingerprinting: A Guide for the Non-Scientist*, Crim. L. Rev. 105-06, 1987. See also Gaensslen, Sourcebook in Forensic Serology, Immunology, and Biochemistry, Aug. 1983, at 25 ("The DNA of the cell is organized in the nuclear chromosomes.").

² Giannelli & E. Imwinkelried, *Scientific Evidence*, Section 17-8(E), at 602 (1986) [hereinafter *Scientific Evidence*].

³ See A. Moenssens, F. Inbau, & J. Starrs, *Scientific Evidence in Criminal Cases* 355 (3d Ed., 1986) [hereinafter *Scientific Evidence in Criminal Cases*]. ("The design for every living organism is contained in information stored within the deoxyribonucleic acid (DNA) molecule" [footnote omitted]).

⁴ *Id.*

⁵ *Stedman's Medical Dictionary*, 5th Unabridged Lawyers' Edition 580 (1982) (The [gene] as a functional unit probably consists of a discrete segment of a giant DNA molecule containing the proper number of . . . bases in the correct sequence to code the sequence of amino acids needed to form a specific peptide.").

⁶ *Id.*

⁷ *Scientific Evidence*, *supra* note 2, at 603; *Scientific Evidence in Criminal Cases*, *supra* note 3, at 356.

⁸ *Scientific Evidence*, *supra* note 2, at 603.

⁹ *Id.* at 603; *Scientific Evidence in Criminal Cases*, *supra* note 3, at 356.

¹⁰ *Scientific Evidence*, *supra* note 2, at 603.

¹¹ *Id.* See also *Scientific Evidence in Criminal Cases*, *supra* note 3, at 356.

bonds form long polynucleotide chains, known as the nucleic acid.¹² When two polynucleotide chains bind together in parallel fashion,¹³ the double helix of DNA is formed.¹⁴

The double helix is bound together by hydrogen bonds between the adenine and thymine bases, and between the cytosine and guanine bases.¹⁵ Adenine will only bind with thymine, and cytosine will only bind with guanine,¹⁶ thereby setting up "A-T" and "C-G" complementary base pairs.¹⁷ One helix will bind together with another when their bases complement each other and mate, much like teeth in a zipper. The double helix is twisted along its entire length in "spiral staircase" fashion.¹⁸

The number of base pairs in one complete DNA strand is astronomical.¹⁹ The order of these base pairs along the strand determine a person's genetic make-up.²⁰ Not all base pairs, however, encode genetic information. It has been estimated that only about 45 percent of the base pairs is necessary "for normal cell operation."²¹ The purpose of the remaining 55 percent base pairs is a mystery.²² At random points along the DNA strand, the non-coding base pairs occur in a repeated sequence at points called "stutters."²³ A "stutter" can be roughly analogized to a skip in a musical record where the needle "reads" the same recorded sound-track occurring over and over again.

Evaluation of DNA base pair sequences resulted in the discovery of intervals throughout the DNA strand called restriction sites.²⁴ A restriction site occurs when the base sequence on one helix is exactly the reverse of the base sequence on the adjoining helix.²⁵ The restriction sites occur randomly throughout the DNA of the chromosomes.²⁶

In 1970, researchers discovered a method to cut the long DNA double helix at the restriction sites by applying an enzyme called a restriction enzyme.²⁷ The enzyme acts like scissors in cutting the DNA strand at the restriction sites. Further research revealed areas of the DNA strand that "showed marked variations in base sequence from one individual to the next (called polymorphisms)."²⁸ The cut DNA fragments carrying polymorphism; were called restriction fragment length polymorphisms (RFLP's).²⁹ Many of these RFLP's were found to carry highly variable "stutter" sequences.³⁰

The discovery of the RFLP's revolutionized genetic research. In their quest to diagnose genetic disease and other chromosomal abnormalities, medical researchers relied on the RFLP's to isolate the genetic ailment.³¹ It became possible to isolate the specific flaw in the DNA sequence responsible for these diseases. At the same time it was noted that the frequency of occurrence of these RFLP's vary in the human population.³² The comparison of the DNA location of a person's RFLP's with other individuals' RFLP's resulted in the ability to project a statistical frequency of occurrence in the population.³³ It was determined that this statistical frequency could be used to quote the odds of two or more persons having similarly positioned RFLP's.

An identification technique was born. Due to the highly variable restriction sites and RFLP's, no two DNA strands break down into the same pattern. This makes identification possible. Research has revealed that "the statistical likelihood of any two individuals, other than identical twins, having exactly the same polymorphisms in these [highly variable] segments of the DNA molecule, [is] extremely remote."³⁴ While the "overall level of genetic variability in human DNA" is low and "most single-copy DNA probes

¹² Gaensslen, *supra* note 1, at 21.

¹³ The polynucleotide chains are actually running in opposite directions when binding occurs. See *Scientific Evidence in Criminal Cases*, *supra* note 3, at 356.

¹⁴ Gaensslen, *supra* note 1, at 22.

¹⁵ *Id.*

¹⁶ *Scientific Evidence in Criminal Cases*, *supra* note 3, at 356.

¹⁷ In light of this base pair concept, scientists who know the base sequence along one helix can extrapolate and determine the sequence on the complementary adjacent helix. *Id.*

¹⁸ Gaensslen, *supra* note 1, at 23.

¹⁹ Kelly, Rankin, & Wink, *supra* note 1, at 106.

²⁰ *Scientific Evidence*, *supra* note 2, at 107.

²¹ Kelly, Rankin, & Wink, *supra* note 1, at 106.

²² *Id.*

²³ DNA "Fingerprinting" *Advanced As Identification Technique*, *Crim. Prac. Man. (BNA)* Vol. 1, No. 19 (Sept. 23, 1987), at 427 [hereinafter DNA "Fingerprinting" *Advanced*]. See also, Kelly, Rankin, & Wink, *supra* note 1, at 107.

²⁴ Kelly, Rankin, & Wink, *supra* note 1, at 106.

²⁵ This is known as a palindrome sequence. *Id.* at 107.

²⁶ Restriction sites occur randomly in base pair combinations of 6. *Id.* at 106.

²⁷ *Scientific Evidence in Criminal Cases*, *supra* note 3, at 357. Restrictive site enzymes are actually natural defense systems that occur in bacteria and are capable of recognizing the restriction site to be severed on the DNA strand. Kelly, Rankin, & Wink, *supra* note 1, at 107.

²⁸ *Scientific Evidence in Criminal Cases*, *supra* note 3, at 357.

²⁹ See Fact Sheet, *DNA Fingerprinting: The Ultimate Identification Tool*, Cellmark Diagnostics Inc., Jan. 1988, at 7. Restriction fragment length polymorphism is defined as a ("polymorphism in DNA sequence that can be detected on the basis of differences in the length of DNA fragments produced by cutting DNA with a specific restriction enzyme.")

³⁰ Kelly, Rankin, & Wink, *supra* note 1, at 107.

³¹ Jeffreys, Wilson, Thein, Weatherall, & Ponder, *DNA "Fingerprints" and Segregation Analysis of Multiple Markers in Human Pedigrees*, 39 *Am. J. Hum. Genet.* 11, 12, (1986) [hereinafter *DNA "Fingerprints" and Segregation*].

³² Gaensslen, *supra* note 1, at 39.

³³ *Id.*

³⁴ *Scientific Evidence in Criminal Cases*, *supra* note 3, at 357.

detect few if any RFLP's," genetic probes have been developed to detect those regions that demonstrate base-pair sequences unique to the individual.³⁵ To put it simply, the more the DNA strand varies throughout the population, the less likely it is that any two persons carry the same RFLP's at the same position along the strand.

The DNA "Fingerprint" Test

Before testing can be accomplished, DNA must be secured from the subject and from the questioned sample. Because every nucleated cell contains DNA, the human body is a huge reservoir of DNA. The cells carrying DNA can be extracted from blood, tissue, bone, skin, hair roots, and sperm.³⁶ Saliva and urine are possible sources of DNA if epithelial cells are suspended in these excreted fluids.³⁷

In the laboratory, the DNA is separated from the source cells and suspended in a buffer.³⁸ The isolated DNA is then cut into fragments by application of restriction enzymes.³⁹ These enzymes have the ability to recognize a specific sequence in a double-stranded DNA molecule and to cleave both strands of the molecule everywhere the sequence occurs. Typically, the sequences are 4-6 base pairs long.⁴⁰ The remaining fragments—still in a double-helix formation—are different sizes since the 4-6 base pair restriction point occurs at points spaced randomly along the DNA strand.⁴¹

These fragments are then subjected to electrophoresis.⁴² The DNA fragments are placed in a gel medium, with positive and negative electrical poles at opposite ends of the test

field.⁴³ The electrical current is "applied across the gel which causes the DNA fragments to move through the gel, and the distance moved by each fragment depends on its size."⁴⁴ The longer, heavier (in terms of molecular weight) fragments do not migrate as far nor as rapidly as the shorter, lighter fragments.⁴⁵ The fragments are then denatured in order to break the double-helix into single strands.⁴⁶ These single-strand fragments are transferred to a nylon paper-like material via the "Southern blotting" technique.⁴⁷ The DNA is ready to be probed.

The probes are cloned recombinant DNA (rDNA)⁴⁸ strands that are bombarded with radioactive isotopes.⁴⁹ The probes are introduced onto the membrane and bind—hybridize—with only those DNA fragments that share the complementary base sequence.⁵⁰ In essence, the probes "zip" together with the fragments. The membrane is then rinsed with a series of solutions to remove the fragments and probes that failed to hybridize,⁵¹ and is exposed to x-ray film which results in the radioactive probes creating a banded image on the film.⁵² These bands resemble the bar or striped inventory code used to mark grocery and retail products.⁵³ This film or plate is the end product of the "fingerprint" probe process, and one is produced for each sample tested.

When two samples are tested, the net result will be two x-ray plates that are compared for an exact match. Unless there is a perfect match between the visual bars on each plate, the DNA in each sample came from two separate individuals.⁵⁴ There are no "close calls," no "three-out-of-

³⁵ DNA "Fingerprints" and Segregation, *supra* note 31, at 12. Long stretches of the DNA strand remains the same throughout the population: All normally developed human beings have a head, two arms and two legs, for example. The focus, rather, is on those areas of the strand that vary dramatically from person to person. Lewis, *DNA Fingerprints & Witness For The Prosecution*, Discover, June 1988, at 47. These unique areas are the RFLP's.

³⁶ Tyler, Kirby, Wood, Vernon, and Ferris, *Human Blood Stain Identification and Sex Determination in Dried Blood Stains Using Recombinant DNA Techniques*, 31 J. Forensic Sci. 267 (1986) [hereinafter *Human Blood Stain Identification*]; Gill, Jeffreys, & Werrett, *Forensic Application of DNA "Fingerprints"*, 318 Nature 577, 578 (December 12, 1985).

³⁷ *Human Blood Stain Identification*, *supra* note 36, at 267.

³⁸ Kanter, Baird, Shaler, & Balazs, *Analysis of Restriction Fragment Length Polymorphisms in Deoxyribonucleic Acid (DNA) Recovered from Dried Bloodstains*, 31 J. Forensic Sci. 403, 404 (1986) [hereinafter *Analysis of Restriction Fragment Length Polymorphisms*].

³⁹ Kelly, Rankin, & Wink, *supra* note 1, at 107.

⁴⁰ Lange & Boehnke, *Some Combinatorial Problems of DNA Restriction Fragment Length Polymorphisms*, 35 Am. J. Hum. Gen. 177, 178 (1983).

⁴¹ Kelly, Rankin, & Wink, *supra* note 1, at 106.

⁴² *Id.* at 107. "Electrophoresis is the movement of charged particles in solution under the influence of an electric field." Gaensslen, *supra* note 1, at 58.

⁴³ Kelly, Rankin, & Wink, *supra* note 1, at 107 ("DNA is placed in a small slot in one end of a gel, which is made in a [mold] (not unlike a fruit jelly) about 10×14 [cm] in size and about 0.5 [cm] thick.").

⁴⁴ *Id.*

⁴⁵ Lange & Boehnke, *supra* note 40, at 178.

⁴⁶ *Id.*

⁴⁷ Kelly, Rankin, & Wink, *supra* note 1, at 107. This method, named after its inventor, Professor Ed Southern, allows the DNA fragments to pass onto the nylon membrane much the same as ink moves onto blotting paper. *Id.*

⁴⁸ Recombinant DNA is defined as: "DNA resulting from the insertion into the chain, by chemical or biological means, of a sequence (a whole or partial chain of DNA) not originally (biologically present in that chain). Stedman's Medical Dictionary, *supra* note 5, at 1207.

⁴⁹ Lange & Boehnke, *supra* note 40, at 178; Giusti, Baird, Pasquale, Balazs & Glassberg, *Application of Deoxyribonucleic Acid (DNA) Polymorphisms to the Analysis of DNA Recovered from Sperm*, 31 J. Forensic Sci. 409, 411 (1986) [hereinafter *Application of Deoxyribonucleic Acid (DNA) Polymorphisms*].

⁵⁰ Kelly, Rankin, & Wink, *supra* note 1, at 108.

⁵¹ *Application of Deoxyribonucleic Acid (DNA) Polymorphisms*, *supra* note 49, at 411.

⁵² Kelly, Rankin, & Wink, *supra* note 1, at 108. "Different-sized bands (DNA segments) appear in different locations on the piece of film and result in different band patterns for different individuals. If the pattern of bands generated for one individual differs from the pattern generated for a second individual, then it is possible to genetically differentiate the first person from the second. This gives a basis for identification." Fact Sheet, *DNA Fingerprinting (sm): The Ultimate Identification Test*, Cellmark Diagnostics, Jan. 1988, at 2.

⁵³ *Id.* See also *DNA "Fingerprinting" Advanced*, *supra* note 23, at 427.

⁵⁴ *DNA "Fingerprinting" Advanced*, *supra* note 23, at 428.

four" matches, and no false positives.⁵⁵ A total match is necessary to conclude that the DNA in each test sample came from the same person.⁵⁶

The Strengths and Weaknesses

DNA "fingerprint" probes have been conducted for research purposes on dried bloodstains,⁵⁷ dried sperm stains,⁵⁸ blood samples,⁵⁹ sperm samples,⁶⁰ vaginal secretions,⁶¹ and hair roots.⁶² The results of these tests have been remarkably favorable for the use of the probe. Due to the affinity for the probes to mate with their complementary sequences on the fragments, only a tiny amount of DNA is required for the probe.⁶³ An amount of DNA between 0.5 to 5 micrograms (ug)—an amount recoverable from a single drop of blood—is sufficient to activate an exposure on the x-ray plate.⁶⁴ Also, the test shows the uniqueness of an individual's DNA "fingerprint" clearly. Even siblings' DNA patterns will vary, a fact readily identifiable by comparison of the plates.⁶⁵ This is not the case with identical twins.⁶⁶

Research has demonstrated the stability of DNA as test material. Probes of DNA extracted from four-year-old semen stains and bloodstains have been successful.⁶⁷ Additionally, sperm DNA is particularly hearty, a characteristic that permits ready separation of sperm cells from vaginal secretion that contains cells from the female. An

application of lysine will destroy and remove these female cells from the sample, leaving only the sperm cells for DNA testing.⁶⁸ The survivability of DNA is further demonstrated by the successful extraction of the genetic material from mummies,⁶⁹ and from the 8,000 year-old preserved brains of Indians recovered in a Florida peat bog.⁷⁰

There are no false positive results with the DNA probe. If the DNA has degenerated too much, the bars will not be recorded on the x-ray plate.⁷¹ The x-ray plates will match identically if the two tested samples originated from the same person. There will be no "close-but-not-exact" match.⁷² The only exception to this rule is where a mutant gene shows up as one of the bands.⁷³ Although rare,⁷⁴ this phenomenon can occur when a gene in the DNA of one of the samples mutated when it was replicated.⁷⁵ Comparison of the DNA sequence of a cell carrying a mutant gene with the DNA sequence from a normal cell will show a one-band discrepancy.⁷⁶ The danger is that when samples from the same individual are compared for identification, the mutant gene will cause a mismatch which could lead to the improper exclusion of that person as the source of the samples. To confirm that the mismatch is due to the mutant gene, another section of the DNA strand must be probed.⁷⁷ If there is an exact match in the second probe, a mutation is the likely cause of the mismatch.⁷⁸

⁵⁵ *Id.* (Leading DNA "fingerprint" researcher Dr. Alec Jeffreys has demonstrated that "either the bar codes match exactly, or only a few points in the pattern match. Jeffreys has not found a situation where, for example, only two or three points don't match"). See also *Analysis of Restriction Fragment Length Polymorphisms*, *supra* note 38, at 407 (If the DNA sample is degraded, no bands will be produced on the x-ray plate).

⁵⁶ *Caveat*: A complete match is vulnerable to the rare occurrence of a mutant gene in one of the DNA samples. *DNA "Fingerprinting" Advanced*, *supra* note 23, at 428. This mutant gene phenomenon will be addressed, *infra* notes 72-78, and accompanying text.

⁵⁷ See *Analysis of Restriction Fragment Length Polymorphisms*, *supra* note 38; Gill, Lygo, Fowler & Werrett, *An Evaluation of DNA Fingerprinting For Forensic Purposes*, 8 *Electrophoresis* 38 (1987) [hereinafter *An Evaluation of DNA*].

⁵⁸ See *Application of Deoxyribonucleic Acid (DNA) Polymorphisms*, *supra* note 49; *An Evaluation of DNA*, *supra* note 57.

⁵⁹ See *An Evaluation of DNA*, *supra* note 57; *DNA "Fingerprints" and Segregation*, *supra* note 31; Jeffreys, Wilson & Thein, *Individual-Specific "Fingerprints" of Human DNA*, 316 *Nature* 76 (1985).

⁶⁰ See *An Evaluation of DNA*, *supra* note 57.

⁶¹ *Id.*

⁶² *Id.* See also Gill, Jeffreys, & Werrett, *supra* note 36, at 578 (Attempts to isolate DNA from the hair shaft have failed.).

⁶³ Kelly, Rankin, & Wink, *supra* note 1, at 107-08.

⁶⁴ Jeffreys, Wilson, & Thein, *supra* note 59, at 77. See also *Analysis of Restriction Fragment Length Polymorphisms*, *supra* note 36, at 405 (Results using different amounts of DNA indicate that a signal on an autoradiogram can be generated with 1 to 4 micrograms (ug). As a reference point, note that studies show a 1 ml (4mm) bloodstain can contain between 27-73 ug DNA while 1 ml blood can contain 40 ug DNA. Therefore, approximately 200 ul blood is enough for two probes. *Id.* See also Gill, Jeffreys, & Werrett, *supra* note 36, at 578 ("Approximately 5 ul of semen or equivalent semen stain and 60 ul of blood or equivalent bloodstain [are required for DNA fingerprinting]"); *DNA "Fingerprinting" Advanced*, *supra* note 23, at 428 ("10 hair roots . . . will suffice for the test."). But see, *infra* note 106, and accompanying text.

⁶⁵ *DNA "Fingerprinting" Advanced*, *supra* note 23, at 427.

⁶⁶ See, *infra* notes 84-85, and accompanying text.

⁶⁷ See Gill, Jeffreys, & Werrett, *supra* note 36, at 577. See also *Application of Deoxyribonucleic Acid (DNA) Polymorphisms*, *supra* note 49, at 414 ("Note that high molecular weight DNA has been extracted and RFLP analysis performed in three-year-old bloodstains . . . , and it is possible that DNA in semen stains will demonstrate a similar degree of stability.").

⁶⁸ See *Application of Deoxyribonucleic Acid (DNA) Polymorphisms*, *supra* note 49, at 412.

⁶⁹ Paabo, *Molecular Cloning of Ancient Egyptian Mummy DNA*, 314 *Nature* 644-45 (1985).

⁷⁰ Rensberger, *8,000-Year-Old Genetic Link Found*, *The Washington Post*, May 6, 1988, at A3.

⁷¹ *Application of Deoxyribonucleic Acid (DNA) Polymorphisms*, *supra* note 49, at 414-15 ("Conditions that destroy or degrade DNA do not produce an abnormal pattern of bands; instead no bands are observed.").

⁷² See *DNA "Fingerprinting" Advanced*, *supra* note 23, at 428 ("[T]wo DNA fingerprints from the same person will always be an identical match . . .").

⁷³ *Id.*

⁷⁴ See Jeffreys, Wilson, & Thein, *supra* note 59, at 78.

⁷⁵ *DNA "Fingerprinting" Advanced*, *supra* note 23, at 428.

⁷⁶ *Id.*

⁷⁷ *Id.*

⁷⁸ *Id.*

Finally, the maintenance of records of DNA "fingerprints" should prove quite manageable. The computerization of the DNA "fingerprint" is feasible since the DNA code is capable of mathematical interpretation.⁷⁹ In fact, California, New York, and Washington are studying the feasibility of creating DNA "fingerprint" databases.⁸⁰

Studies have also revealed problems with the DNA probe. First, research has noted that an insufficient amount of DNA may produce faint signals that could prove confusing for comparison purposes.⁸¹ Second, DNA samples are susceptible to deterioration.⁸² Third, because all living organisms carry DNA in their cells, it is not carried by human beings alone. One study noted, however, the successful identification of human DNA in a series of probes contrasting sheep, pig, cow, chicken, and dog DNA.⁸³ Fourth, the identification value of DNA is lost when the case involves identical twins. Because identical twins are the product of a single egg that, after fertilization by a single sperm, separates into two cells before cell division begins, they carry the exact same genetic material.⁸⁴ A probe of each twin's DNA would result in a perfect match.⁸⁵

Presently, only commercial laboratories are set up for DNA testing. The use of radioactive probes in the process require laboratories to be outfitted with the necessary equipment to handle the radioactive materials.⁸⁶ This limits the ability of government crime laboratories to adopt these procedures. It may be possible in the future, however, to employ nonradioactive probes to label repetitive sequence probes.⁸⁷

Finally, some experts suggest that there is presently an insufficient database and lack of independent testing against which to measure the claims of the commercial laboratories,⁸⁸ although independent testing has been initiated.⁸⁹

Furthermore, efforts continue to genetically map the full strand of DNA, and in so doing, more and more RFLP's will be isolated and recorded by researchers.⁹⁰ This will provide experts with more genetic reference points for use in distinguishing DNA samples for identification purposes.

Putting Science To Work: The Laboratories

To date, three commercial laboratories—Cellmark Diagnostics, Inc., of Germantown, MD; Lifecodes, Inc., of Tarrytown, NY; and Cetus, Inc., of Emeryville, CA—provide DNA testing services. All three of these labs probe DNA material for identification testing; however, each has developed its own patented technique. At Cellmark, the approach used was developed by Dr. Alec Jeffreys, a British researcher and leading expert in DNA "fingerprinting," who first applied the DNA probes in a criminal investigation three years ago.⁹¹ Cellmark uses the RFLP process discussed above. The probe, patented and licensed to Cellmark by Lister Institute in England, is a multi-locus probe, i.e., it examines many points along the DNA strand.⁹² The resultant x-ray shows several rows of black bars, looking most like the grocery inventory codes. The statistical results of this method are impressive: The average probability of two unrelated persons having identical "fingerprints" under this approach is 1-in-1 quadrillion, and even if the two persons are siblings, the chances are then only 1-in-10 trillion.⁹³

Like Cellmark, Lifecodes also uses the RFLP process. However, Lifecodes performs the test using a single-locus probe (which examines a single site on the DNA).⁹⁴ The result is an x-ray plate that shows only two bands, making the plate easier to read.⁹⁵ The single-locus probe requires a smaller sample than the multi-locus probe.⁹⁶ The statistical conclusion of the single site probe is not as convincing as that rendered by the multi-locus probe.⁹⁷ Therefore, at

⁷⁹ Report entitled *Background Information: DNA-Print(tm) Identification Test*, Lifecodes Corporation (1986), at 8.

⁸⁰ Herman, *British Police Embrace 'DNA Fingerprints'*, Washington Post Health, Nov. 24, 1987, at 9; Moss, *DNA—The New Fingerprints*, ABA Journal, May 1, 1988, at 70.

⁸¹ See *An Evaluation of DNA*, supra note 57, at 43.

⁸² See Hockstader, *DNA "Fingerprinting" Inconclusive in Scott Trial*, The Washington Post, at A11 (DNA recovered from semen sample, which was nearly five years old, deteriorated so much that conclusive reading was impossible).

⁸³ See *Human Blood Stain Identification*, supra note 36, at 270-71. (It found, however, that DNA from primates could cross-react with one of the probes. These researchers were confident, however, that primate DNA and human DNA was sufficiently different to result in minimal hybridization and that the chances of primate samples being involved with forensic study are minimal. Notwithstanding this confidence, they suggested that the DNA sequence similarities between humans and primates should be studied despite the rarity of forensic analysis of primate evidence.)

⁸⁴ *DNA "Fingerprinting" Advanced*, supra note 23, at 427.

⁸⁵ *Id.*

⁸⁶ See *Human Blood Stain Identification*, supra note 36, at 270.

⁸⁷ *Id.*

⁸⁸ California Attorney General John Van de Kamp and Professor George Sensabaugh of the University of California at Berkeley's School of Public Health have called for independent study to validate the claims of DNA testing advocates. See Moss, supra note 80, at 69.

⁸⁹ The Federal Bureau of Investigation (FBI) Crime Lab at Quantico, VA is "testing blood from volunteers to formulate its own statistics on the likelihood of any two unrelated individuals showing the same DNA results." *Id.* at 70.

⁹⁰ Stipp, *Genetic Map That Could Speed Diagnosis of Inherited Disease Touches Off Dispute*, Wall Street Journal, Oct. 8, 1987, at 33.

⁹¹ Thompson, *DNA's Troubled Debut*, The California Lawyer, June 1988, at 41.

⁹² Cellmark also has developed a single locus probe (one that examines a simple site on the DNA strand) in order to achieve greater sensitivity when testing smaller samples. Fact Sheet, supra note 29, at 6.

⁹³ *DNA "Fingerprinting" Advanced*, supra note 23, at 427.

⁹⁴ Moss, supra note 80, at 69.

⁹⁵ *Id.*

⁹⁶ *Id.*

⁹⁷ *Id.*

least three single-locus probes are used to raise the statistical index. In the end, the group of x-ray plates will be analyzed together to achieve an overall statistical profile in the neighborhood of a 99.9% chance of positive identification.⁹⁸

The Cetus approach is significantly different than Cellmark's and Lifecodes'. Cetus uses enzymes in what is known as the polymerase chain reaction technique.⁹⁹ Polymerase, an enzyme, is obtained from bacteria living in hot springs and geysers, and is used to amplify the target DNA extracted from the questioned sample.¹⁰⁰ The amplification is accomplished by using a device called a thermal cycler.¹⁰¹ Once amplified, the DNA is placed on a filter and gene probes are applied. If the complementary genetic sequence—or variant—is present, the probe will indicate the match by "lighting up" or producing a blue dot.¹⁰² If both test samples show the same blue dots, there is a match.¹⁰³ No x-ray "fingerprint" plate is produced. Because the target area on the DNA is considerably narrower than the RFLP approach, several gene probes are required in order to produce a useful average of occurrence in the population. With the Cetus approach, even the smallest of samples have the potential of being applied and tested,¹⁰⁴ an advantage that must be weighed against its less discriminating results. The DNA "spot" probe holds the special place in forensic history as being the first DNA identification test used in a criminal prosecution in the United States.¹⁰⁵

In the past, the Cetus approach has gained a conclusive genetic result using only 40 sperm head, whereas the approaches used by Cellmark and Lifecodes require "several hundred thousand sperm heads or a well-soaked bloodstain the size of a quarter."¹⁰⁶ This sample requirement plagues the Cellmark and Lifecodes techniques. "[M]any of the several hundred criminal cases handled so far [by both labs] have produced inconclusive results due to low molecular weight of the sample."¹⁰⁷

The Evidence

Every nucleated cell in the body has the potential of revealing the identity of its "owner." Blood, semen, or skin left behind at the scene of a crime by the offender is, therefore, critical evidence of his identity. Using the DNA "fingerprint," the DNA extracted from this evidence can be compared with the DNA extracted from a suspect's blood sample. A match will signal that the evidence was a product of the suspect.

The trial counsel must ensure admission of the test results at court-martial. Two "bottom line" points of evidence are critical: (1) the x-ray plates showing the match between the sample DNA and the accused's DNA, and (2) the probability statistics of another having the same DNA make-up. To gain admission of this evidence, trial counsel must understand the standards for admissibility, and formulate a detailed evidentiary foundation utilizing expert testimony.

Admissibility

The Standard.

The DNA "fingerprint" test is a novel scientific technique, i.e., it has not achieved sufficient reliability as a scientific method to qualify for judicial notice at court-martial.¹⁰⁸ Admissibility of novel scientific evidence in the military is governed by the dictates of *United States v. Gipson*.¹⁰⁹ In that case, the Court of Military Appeals rejected the *Frye*¹¹⁰ "general acceptance in the scientific community" test as the "be-all-and-end-all" standard of admissibility, and adopted the relevancy test in its place.¹¹¹ This is a two-prong test. First, the scientific evidence must be legally relevant, and, second, if that evidence is presented via expert testimony, the testimony must be helpful.¹¹²

Legal relevance is the sum of Military Rules of Evidence (Mil. R. Evid.) 401, 402, and 403.¹¹³ The evidence must be

⁹⁸ *Id.* See also Report, *supra* note 79, at 1; Lewis, *supra* note 35, at 52. (Dr. Michael Baird of Lifecodes testified in a Florida rape case that one in ten billion people would have the same DNA pattern as the accused.) Toups, *DNA Testing Wins Court Concession*, The Fairfax Journal, July 7, 1988, at A3. (In a Virginia murder case, Dr. Baird testified that the accused's DNA pattern was only one in 135 billion.). These probabilities were achieved using the Lifecodes method.

⁹⁹ Moss, *supra* note 80, at 69.

¹⁰⁰ *Id.*

¹⁰¹ *Id.*

¹⁰² *Id.*

¹⁰³ *Id.*

¹⁰⁴ It is suggested that a sample containing only one cell from a single hair would be a sufficient sample. Thompson, *supra* note 91, at 41.

¹⁰⁵ The case was *Commonwealth of Pennsylvania v. Pestinikas*. In that murder case, the prosecutor used DNA testing on the corpse of the alleged victim and bagged internal organs exhumed therewith. He sought to prove that the defendants had switched the organs to hide evidence of starvation due to their improper care of the alleged victim. Instead, the test proved that the organs belonged to the corpse. The prosecutor went ahead and introduced the test results and organs to show that the organs were from the victim, and that the organs evidenced starvation. Moss, *supra* note 80, at 68.

¹⁰⁶ *Id.* Cecil L. Hider, Director, California Criminalistics Institute, opined that samples of that size are rare after most crimes. Thompson, *supra* note 91, at 41.

¹⁰⁷ Thompson, *supra* note 91, at 41.

¹⁰⁸ See *United States v. Downing*, 753 F.2d 1224, 1237 (3d Cir. 1985) (the fundamentals of novel scientific evidence are not suitable candidates for judicial notice, therefore a preliminary inquiry is required before admission).

¹⁰⁹ 24 M.J. 246 (C.M.A. 1987).

¹¹⁰ *Frye v. United States*, 293 F. 1013 (DC Cir. 1923).

¹¹¹ *Gipson*, 24 M.J. at 252. This test employs an evidentiary standard based on four rules of evidence: Mil. R. Evid. 401, 402, 403, and 702. *Id.* at 250-51.

¹¹² *Id.* at 251. See also, *United States v. Mance*, 26 M.J. 244, 247 (C.M.A. 1988); Wittman, *United States v. Gipson: Out of the Frye Pan Into the Fire*, The Army Lawyer, October 1987, at 12.

¹¹³ *Id.* at 251.

logically relevant pursuant to Mil. R. Evid. 401, i.e., the evidence must be probative of the existence of any fact that is of consequence to the action, and if it is, it is then admissible under Mil. R. Evid. 402. Under Mil. R. Evid. 403, the probative value of the evidence cannot be outweighed by the danger of unfair prejudice, confusion of the issues, misleading the members, undue delay, waste of time, and needless presentation of cumulative evidence.

Mil. R. Evid. 702¹¹⁴ controls use of expert testimony at courts-martial. It requires that the testimony be helpful to the fact-finder.¹¹⁵ In deciding whether the expert testimony is helpful, the military judge must employ a checklist which directs the balancing of the following:

(1) the soundness and reliability of the process or technique used in generating the evidence, (2) the possibility that admitting the evidence would overwhelm, confuse, or mislead the jury, and (3) the proffered connection between the scientific research or test result to be presented, and particular disputed factual issues in the case.¹¹⁶

Reliability of the scientific evidence is the focus of both prongs of the *Gipson* test.¹¹⁷ The military judge must determine whether the scientific evidence is reliable when evaluating both the probativeness and helpfulness of the evidence.¹¹⁸ Generally, the reliability of all evidence based on scientific theory is dependent upon the demonstration of three factors: (1) the underlying principle is valid, (2) the technique applying this principle is valid, and (3) the technique was properly applied with respect to the evidence introduced.¹¹⁹

The first two factors—the validity of the underlying principle and the validity of the technique—are critical only with regard to the admissibility of evidence derived from a novel scientific technique. Once a technique is sufficiently established, a court may take judicial notice of the principle and the technique, thereby relieving the offering party of the burden of producing evidence on these issues.¹²⁰

To evaluate reliability, and, therefore, probativeness and helpfulness, the military judge needs to use what the Court of Military Appeals termed as “tools” of persuasion.¹²¹

Ironically, one of the most useful tools is that very degree of acceptance in the scientific community we just rejected as the be-all-and-end-all standard. . . . The point is, general acceptance [under *Frye*] is a factor that may or may not persuade; it is not the test. Other factors may now be equally persuasive.¹²²

Other “tools” include “the degree of acceptance in the scientific community, the [expert’s] qualifications, the use of [the scientific technique] in non-legal areas, normal rates of errors, whether the data is objectively measured (e.g., chemical analysis) or subjectively measured (e.g., polygrapher’s or handwriting expert’s opinion), and whether an expert pool exists for independent evaluation.”¹²³ The novelty of the technique, i.e., “its relationship to more established modes of scientific analysis, and the existence of specialized literature dealing with the technique are other factors.”¹²⁴ This list is not exhaustive.¹²⁵

The Foundation.

Because DNA “fingerprint” evidence is novel scientific evidence, the validity of both the underlying principle of the test and the technique applying this principle will have to be established by expert testimony. Proper application of laboratory procedures in the specific case will have to be proven similarly.

In order for the DNA evidence to be admissible, the issue at court-martial must go to the identity of the “contributor” of the questioned blood, serum, skin, tissue, etc. Once this logical relevance of the test results is established, the probative value of the evidence must be weighed against the Mil. R. Evid. 403 dangers. The danger most likely to be triggered by this evidence is its potential to be difficult to comprehend. This danger is posed not so much from the introduction of a matched set of x-ray plates as it is from the introduction of the statistical probability conclusion.¹²⁶ The odds e.g., one-in-thirty-billion or one-in-ten trillion, are so

¹¹⁴ Mil. R. Evid. 702 provides:

If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify hereto in the form of an opinion or otherwise.

¹¹⁵ *Gipson*, 24 M.J. at 251. *Downing*, 753 F.2d at 1235. See also Saltzburg, Schinasi, and Schlueter, Military Rules of Evidence Manual 588 (2d Ed. 1986) (“The test [for admission of expert testimony] is whether the expert can be helpful.”).

¹¹⁶ *Gipson*, 24 M.J. at 251, quoting *Downing*, 753 F.2d at 1237 [footnote omitted].

¹¹⁷ *Gipson*, 24 M.J. at 251–52. “The probative value of scientific evidence . . . is connected inextricably to its reliability; if the technique is not reliable, evidence derived from the technique is not relevant.” [footnotes omitted]. Giannelli, *The Admissibility of Novel Scientific Evidence: Frye v. United States, A Half-Century Later*, 80 Colum. L. Rev. 1197, 1235 (1980).

¹¹⁸ “The probative value of scientific evidence depends on its reliability, and since most judges do not possess the scientific background to determine reliability, the trial judge is often forced to depend on expert testimony to ascertain probative value.” Scientific Evidence, *supra* note 2, at 32.

¹¹⁹ Giannelli, *supra* note 117, at 1200–01 (1980); Scientific Evidence, *supra* note 2, at 1–2.

¹²⁰ Giannelli, *supra* note 117, at 1202 [footnote omitted].

¹²¹ *Gipson*, 24 M.J. at 251–52.

¹²² *Id.* at 252. See also Military Rules of Evidence Manual, *supra* note 115, at 589 (“It should be noted, however, that Rule 703, which states the permissible bases for expert opinions, requires that an expert rely upon data ‘reasonably relied upon by experts in the particular field.’ This would suggest that some acceptance of scientific evidence in the general fields in which the expert works is necessary if an expert is to satisfy the Rule.”).

¹²³ Wittman, *supra* note 112, at 14 (citing the Weinstein factors recognized by the Court of Military Appeals in *Gipson*, 24 M.J. at 252).

¹²⁴ *Downing*, 753 F.2d at 1238–39.

¹²⁵ See *Mance*, 26 M.J. at 247–48 (The court applied several factors in determining that expert testimony regarding the melanin interference test would not be helpful to the factfinder.).

¹²⁶ Some experts believe that insufficient DNA “fingerprint” tests have been performed to allow the quotation of astronomical odds. See, e.g., Toups, *supra* note 98, at A3 (Professor James Starrs of George Washington University and a consultant for Cellmark Diagnostics questioned “how Lifecodes can establish ‘astronomical’ odds when they have done only 3,000 DNA tests”).

extraordinary that the numbers may be difficult to comprehend. To avoid this problem, the expert should describe this statistical conclusion in terms that the layman can understand, perhaps by using a simple analogy to describe just what "one-in-thirty-billion" means.¹²⁷

Is the DNA "fingerprint" test reliable? The military judge must know this when he determines the relevance of the evidence, and the helpfulness of the expert testimony. The validity of the underlying principle of the DNA "fingerprint" test and the techniques applying this principle must be established in order to demonstrate the test's reliability. The underlying principle is that DNA, as the carrier of the genetic code for a complete human being, is located in every nucleated cell of the body. Each person's DNA make-up is unique, except in the case of identical twins, and identification of these unique areas along the DNA strand make it possible to distinguish one person from another.

The technique is based on the fact that DNA remains intact in the cell despite that cell's expulsion from the body. The DNA strand can be isolated and broken down for analysis. Using probes, those areas along the strand that are highly unique to the individual can be located and recorded on an x-ray plate. Comparison of the x-ray from an individual and the x-ray from a questioned sample, like a blood stain, can determine whether that person is the contributor of the sample.

This reliability analysis requires the application of the aforementioned "tools" of persuasion. Because the *Frye* test is one of the most useful—if not the most persuasive—tools available, trial counsel should attempt to meet the test. Under *Frye*, the field in which the underlying principle falls must be identified.¹²⁸ Second, the principle and technique must be demonstrated as having been accepted by members of the field.¹²⁹

To meet *Frye*, then, it must be recognized that DNA "fingerprinting" is a technique within the field of genetics. Inclusion of the "fingerprinting" method within this field will afford trial counsel a sufficient pool of experts who are knowledgeable in the area of DNA probing. Once the field is selected, the trial counsel must show that the "fingerprint" method is generally accepted in this field. It is important to remember that DNA probes are used extensively for medical research. This fact supports the argument that the underlying principle of DNA "fingerprint" is well established in the scientific community. If the trial counsel

cannot establish the general acceptance of the underlying principle of DNA testing, the validity of the principle must be proven by demonstrating the successful application of the technique—the actual DNA "fingerprint" test. This may prove to be more difficult. Although there have been a number of studies using DNA probing as an identification technique, some experts believe more independent testing is necessary before a satisfactory empirical database is available.¹³⁰

Beyond *Frye*, other "tools" of persuasion are available to demonstrate the reliability of the DNA test. These include positive results of conventional serological tests that are consistent with the DNA test result; the fact that a defense expert observed the testing procedure; the fact that the experts are highly trained, skilled, and experienced in genetics and DNA probing; the lack of erroneous results; and the lack of any exact match of samples from different people. Independent, noncommercial tests confirming the identification technique, and scientific publications supporting its use are also valuable "tools." The fact that the evidence has been admitted in other criminal prosecutions is also very persuasive.

The Testimony.

At least two witnesses should be called to lay the evidentiary foundation. First, an independent expert should testify about the validity of the underlying principle. Second, the expert from the commercial laboratory is needed to testify about the technique applied, the procedures used that are unique to that laboratory, and the results obtained. The advantage of this approach is that, arguably, the independent expert is beyond the profit-making cloud of the commercial lab and is free from such motivation in testifying.

The independent expert should be qualified in the field of genetics. This witness must be capable of testifying about the underlying principle of the DNA "fingerprint" test and the general techniques applying the principle, *i.e.*, isolating and probing DNA for medical research purposes.¹³¹

The commercial laboratory expert should be associated with the laboratory that provided the test result. This expert's testimony will focus on two major points: The test conducted at his lab concluded that the evidence originated from the accused, and the probability that anyone else was the source is extremely slight (using the statistical probability). This expert must explain the DNA "fingerprint"

¹²⁷ For example, one suggestion is to demonstrate that the odds reflect that the sample is one-of-a-kind within the populations of x number of planet Earths.

¹²⁸ Scientific Evidence, *supra* note 2, at 16; Giannelli, *supra* note 117, at 1208. Commentators have recognized the difficulty in identifying the relevant field or discipline under which the principle qualifies. Care must be taken to include the major disciplines involved and to provide an expert who is knowledgeable in these areas. The more fluent the experts are in the related disciplines, the greater the likelihood that the court will be properly informed and, in effect, adequately persuaded to admit the evidence. Another concern in designating the field is when a sub-specialty is concerned. A danger lies in choosing too narrow a sub-specialty in which a general consensus in that scientific community cannot be reached. See *id.*, at 1208-09.

¹²⁹ *Id.* "Since establishing the underlying principle does not automatically validate a technique purportedly based thereon, the offeror must then go on to prove acceptance of the technique as a separate issue." Goodman & Zak, *The Heat Is On: Thermograms as Evidence Under the Frye Standard*, 8 W. New Eng. L. Rev. 13, 44 (1986) (footnotes omitted). This position, however, is not well-settled. As one commentator notes, "[i]t is unresolved whether the *Frye* standard requires general acceptance of the scientific technique or of both the underlying principle and the technique applying it." Giannelli, *supra* note 117, at 1211 (footnote omitted). See also Scientific Evidence, *supra* note 2, at 20. (An approach requiring the acceptance of both the underlying theory and the technique applying it "would present problems for a technique that has been validated empirically, but whose underlying theory has not been established or understood completely. With such techniques there may be no general acceptance of the theory."). Under *Frye* it is possible that the scientific technique may involve either the new application of a well-established theory or the application of a new theory. In the latter case, the theory can be validated only empirically or inferentially, not deductively. In other words, the successful application of the technique proves the validity of the underlying theory or principle. In terms of the *Frye* test, if the technique is generally accepted, then the theory must be valid although not fully understood or explainable. *Id.* at 1212.

¹³⁰ The lack of independent testing likely will be a major point of attack by the defense. See *infra* notes 132-133 and accompanying text.

¹³¹ This witness should describe the uses of DNA probing in isolating genetic disorders in order to establish general acceptance of DNA probes.

procedure employed by his laboratory, and that this procedure was properly applied in the case about which he is testifying. The testimony must be a detailed, step-by-step analysis of the laboratory work and quality control procedures, and must include a methodology as to how the statistical probability was calculated.

The testimony and evidence in a DNA "fingerprint" case is highly technical and difficult to understand. Trial counsel must lay out the case with a high degree of clarity and precision. To accomplish this, trial counsel must use demonstrative evidence in the form of charts, slides, models, etc. to assist the factfinder in understanding the expert testimony. The more understandable the foundation is, the more likely the possibility that the military judge will admit the DNA evidence and the members will be persuaded by it.

Should It Be Used?

A sample is recovered at the crime scene. Testing reveals that the DNA from the sample matches the DNA from the accused. Should the trial counsel attempt to gain admission of the novel scientific test results at court-martial?

Naturally, investigators and prosecutors would jump at the chance. This anxious pursuit should be tempered, however, with concern that hurried use may result in adverse evidentiary and appellate rulings.¹³² Some leading criminal and scientific experts have called for independent validation of the claims made by the commercial laboratories before rushing into court.¹³³ Other experts take issue with these concerns;¹³⁴ nonetheless, trial counsel must be aware of the concerns before taking the test into trial.

To avoid potential barriers to admissibility, trial counsel should consider the following points. First, when possible, always have the questioned samples tested via conventional serological tests prior to the DNA "fingerprint" test. In this way, the DNA test can be used to confirm the conventional results, or it will serve as a last resort if the conventional tests come back inconclusive. Second, trial counsel must know in what other jurisdictions the test was admitted and what methodologies were used by the successful proponents of the evidence. Third, an expert witness should be called to explain the latest independent studies on the validity of the

test, e.g., experts from the Federal Bureau of Investigation or University of California at Davis.¹³⁵

Finally, trial counsel must be well-versed in the science and the procedures of this novel scientific technique. The prepared trial counsel will have the best chance to gain admission of the test. Until the appellate courts speak on this issue, however, a word of advice to trial counsel: Proceed with care.

The Application

To date, DNA "fingerprint" results have been admitted in several jurisdictions across the United States. State courts in Florida, Oklahoma, New York, Washington, and Pennsylvania have admitted the evidence in criminal prosecutions. There has been no appellate review of these cases to date.¹³⁶ DNA evidence has been admitted in a murder trial in Virginia.¹³⁷

DNA "fingerprint" evidence already has impacted on military justice practice. In the celebrated Marine Corps case, *United States v. Scott*,¹³⁸ vaginal swabs taken from the rape victim were tested by Cellmark Diagnostics at the request of the defense. The swabs were used to collect semen samples from the victim after she was raped on April 20, 1983. The test at Cellmark was conducted during January and February 1988, nearly five years after the rape. The DNA extracted from the semen samples at the laboratory deteriorated so much that a conclusive result could not be reached.¹³⁹ The semen samples were forwarded to Forensic Science Associates in Richmond, California for testing under the Cetus polymerase chain reaction approach. "The test determined that the genetic material was of a type that occurs in nine percent of the population. Scott was determined to have the same type of genetic material."¹⁴⁰ Further testing to narrow the field was halted when Scott was acquitted.¹⁴¹

DNA "fingerprint" evidence has been admitted in at least one court-martial case to date.¹⁴² In *United States v. Lake*,¹⁴³ the defense agreed to stipulate to the admission of DNA "fingerprint" evidence as part of a pretrial agreement. The DNA test conducted by Cellmark Diagnostics concluded that the sperm on the rape victim's panties came from the accused. Because the defense agreed to stipulate to this evidence, the trial counsel was not required to lay an

¹³² California Attorney General Van de Kamp warned that "a rush by prosecutors to use the new DNA typing before independent tests establish the reliability of the procedure could backfire in adverse evidentiary rulings." Moss, *supra* note 80, at 68.

¹³³ Along with Attorney General Van de Kamp (see, Lewis, *supra* note 35, at 44), Professor Sensabaugh (see, *supra* note 88) voiced concern because research validating DNA typing has come primarily from private sector companies. Moss, *supra* note 80, at 69.

¹³⁴ Dr. Edward T. Blake, of Forensic Science Associates in Emeryville, California, argues that DNA typing is proven technology and that attorneys have an obligation to use this evidence. Moss, *supra* note 80, at 69. Additionally, he warns that "[p]rosecutors are leaving virgin territory for the defense to exploit at no risk to the defense." Lewis, *supra* note 35, at 42.

¹³⁵ Moss, *supra* note 80, at 69. Presently, independent studies are being performed by these institutions.

¹³⁶ Thompson, *supra* note 91, at 42.

¹³⁷ *Genetic Test Trial Opens in Arlington*, The Washington Post, July 12, 1988, at 85.

¹³⁸ Corporal Lindsey Scott, USMC, was being retried at Quantico Marine Base after the Court of Military Appeals had reversed his conviction for rape due to ineffective assistance of counsel. See *United States v. Scott*, 24 M.J. 186 (C.M.A. 1987).

¹³⁹ Hockstader, *supra* note 82.

¹⁴⁰ Thomas, *DNA Tests On Marine Uncertain*, The Washington Post, July 21, 1988, at D1.

¹⁴¹ *Id.*

¹⁴² Tests conducted in two other Army cases by Cellmark Diagnostics produced inconclusive results. One test was performed on vaginal and anal swabs collected from rape and homicide victims in *United States v. Gray*, the Fort Bragg, North Carolina case in which the accused was convicted and sentenced to death. The other test involved semen stains on childrens' clothing in a child sexual abuse case at Fort Riley, Kansas.

¹⁴³ ACMR 8800570. This case is presently pending review by the Army Court of Military Review.

evidentiary foundation, and the issue of its admissibility will not be reviewed by the Army Court of Military Review.

Beyond its criminal law use, the DNA "fingerprint" procedure has potential value in other areas of the military. For instance, the procedure can be adopted for identification of remains.¹⁴⁴ The DNA extracted from the charred bones of a deceased soldier may be the only means of identification if the traditional fingerprints and dental remains have disintegrated. This will require the establishment of a complete DNA file in which a soldier's DNA "fingerprint" will be reduced to a computer sequence and stored. Such a database would provide an excellent records pool for use in identifying criminal offenders in the military.

¹⁴⁴ Report, *supra* note 79, at 8, 12.

Conclusion

The DNA "fingerprint" test is available as a forensic identification tool. Its admissibility at court-martial has not been tested on appeal, however. Therefore, trial counsel must be well prepared and very methodical when introducing this evidence at trial.

The value of DNA "fingerprints" will increase dramatically after independent studies have validated the techniques, and when a military-wide computer database is established for storage of servicemembers' DNA "fingerprints." The genetic age has introduced a forensic tool of identification. Now is the time for military trial counsel, investigators, and forensic specialists to study these tools and understand the implications of their use.

Clerk of Court Note

Assigning Cases to ACMR Panels

"The assigning of cases to panels [of a Court of Military Review] is a procedural . . . matter which falls within the prerogative of The Judge Advocate General, and, as delegated, the Chief Judge and the Clerk of Court." *United States v. Vines*, 15 M.J. 247, 249 (C.M.A. 1983). In the Army Court of Military Review, the Clerk of Court is responsible for the routine assignment of incoming article 66 cases. The process begins with a member of the Clerk of Court's office and is completed by our UNISYS minicomputer.

When a record of trial arrives in the Clerk's office, the incoming records manager reviews the trial result, including the convening authority's action, to determine in which of two assignment categories the case belongs. One category is the "guilty plea appeal," which means that all of the approved findings of guilty are based upon pleas of guilty. (Some charges may have been contested, but they were either withdrawn, dismissed, or resulted in acquittal.) The other category is the "contested appeal," meaning that the convening authority has approved a finding of guilty as to at least one specification to which the accused pleaded not guilty. Because we sort incoming cases according to the result of trial, it is important that the promulgating order be correct.

When the assignment category is entered into the computer record of the case, the computer makes the panel assignment by separately rotating the two categories of cases among the five panels of the Court. Perhaps you have guessed the reason why the two categories of cases are rotated separately: It is an attempt to balance the workload among panels, resting on the assumption that more appellate issues will arise from the contested cases than from the guilty plea appeals. Over time, we expect that each panel will receive its fair share of the caseload. Some appellate courts—usually those with rotating panels—wait until briefs are filed before assigning a case to a specific panel. A staff attorney reviews the briefs, assigning weighted values to the issues raised, with a view to equalizing the weighted

values assigned to the panels. Our court does not have sufficient staff to carry out this system. Moreover, since our case is assigned to a panel even before it is briefed, the decision panel can control the progress of the case, ruling upon procedural or substantive motions as they arise.

There are exceptions to the procedure described above. One of them is computer based. The incoming case manager enters into the computer the number of transcript pages in each record of trial. When the computer detects a transcript of 600 or more pages, it assigns that case to the next panel in a separate rotation because of the size of the record—a further attempt to equalize the workload among panels, because every record must be reviewed in detail whether or not any issues ultimately are raised by the appellant.

The remaining exceptions require overriding the computer's assignment programs. Cases the court remands to the trial or convening authority level are, when returned for further review (e.g., after a rehearing), assigned to the panel that previously decided the case. Similarly, cases remanded to the court by the U.S. Court of Military Appeals are returned to the panel whose decision was reviewed.

Frequently, judges of the Army Court of Military Review come to the court from previous assignments as trial judges or staff judge advocates. We avoid assigning cases in which the judges were involved to the panels to which they now belong. Even though the other two judges of the panel constitute a quorum and could dispose of the case (if they did not disagree; or could request a substitute judge if they did), we do not wish to place them in the position of passing on the conduct of a trial judge or staff judge advocate with whom they must now consult daily in the resolution of other cases with the collegiality required by the appellate process. The manager of incoming cases spots these cases and manually diverts them by overriding the computer assignment.

The final override occurs when the case received is a companion of one already assigned to a panel. An effort is

made to assign companion cases to the same panel. That is one reason why the trial counsel must endorse the companion cases' names on the cover of each record of trial. Failure to apprise us of the companion cases can necessitate reassignment of a case from one panel to another after the briefs have been filed and the case is under advisement.

Miscellaneous Docket cases (article 62 appeals and Petitions for Extraordinary Relief) are manually assigned to the panels in numerical rotation. However, Petitions for Extraordinary Relief filed in pending appeals are, like Petitions for New Trial, assigned to the panel to which the article 66 appeal has been assigned.

We think this system works equitably and efficiently. No system, however blind, is completely foolproof, but there is a safety valve: Counsel dissatisfied with the assignment of a case to a particular panel may, for good cause, always seek its reassignment to a different panel.

If you have other questions about the internal operation of the Court of Military Review or the Clerk's office, please contact the Clerk. We will be happy to address your question in these Notes from the Clerk of Court.

TJAGSA Practice Notes

Instructors, The Judge Advocate General's School

Criminal Law Notes

United States v. Hill-Dunning: Court of Military Appeals Establishes Analytical Model for Admissibility of "Ultimate Issue" Testimony

Introduction

Prior to the adoption of the Military Rules of Evidence (Rules), the "ultimate issue" rule precluded witnesses from stating opinions that resolved the ultimate issue to be decided by the trier of fact.¹ Rule 704,² which is a verbatim adaptation of Federal Rule of Evidence 704(a), specifically abolishes the "ultimate issue" rule³ for both lay and expert opinion testimony. While Rule 704 has been around since 1980, some uncertainty still exists regarding the application of the rule at trials by court-martial. Are "ultimate issue" opinions admissible in every instance? What foundation must be laid? What if the opinion is based on the witness assuming the resolution of an "ultimate issue"? The Court of Military Appeals sought to answer these questions in *United States v. Hill-Dunning*.⁴

United States v. Hill-Dunning

After her divorce, Sergeant Brenda Hill-Dunning applied for and received basic allowance for quarters at the "with

dependents" rate. At her court-martial for signing false statements and larceny, she conceded that she was not married, but claimed that she suffered from a mental condition whereby she unconsciously suppressed or denied the fact that she was no longer married. Thus, she presented a mistake of fact defense to the charges. To support this contention, the defense offered testimony of a psychiatrist who had examined her. The military judge allowed the psychiatrist to testify generally regarding repression and denial, but refused to allow the psychiatrist to express her opinion regarding Hill-Dunning's repression and denial.⁵ The military judge, after questioning the psychiatrist, excluded the testimony. The judge believed that the psychiatrist's opinion was based on her acceptance of Hill-Dunning's story.⁶ Incidentally, Sergeant Hill-Dunning was a mental health technician assigned to the base hospital.

The court proceeded to discuss the apparent confusion involving opinions regarding credibility⁷ and opinions that embrace an ultimate issue.

Opinions that embrace an ultimate issue are not automatically admissible under Rule 704. They must be otherwise admissible under the Rules.⁸ Therefore, for lay opinions, the testimony must be rationally based on the perception of

¹ S. Saltzburg & K. Redden, *Federal Rules of Evidence Manual* 688 (4th ed. 1986).

² Rule 704. Opinion on Ultimate Issue

Testimony in the form of an opinion or inference otherwise admissible is not objectionable because it embraces an ultimate issue to be decided by the trier of fact.

³ S. Saltzburg, L. Schinasi, & D. Schleuter, *Military Rules of Evidence Manual* 599 (2d ed. 1986).

⁴ 26 M.J. 260 (C.M.A. 1988).

⁵ *Id.* at 261.

⁶ *Id.* at 264-265.

⁷ In this context, the focus is not on opinion regarding truthfulness under Rule 608(a).

⁸ S. Saltzburg, L. Schinasi, & D. Schleuter, *supra* note 3, at 599.

the witness and helpful to a clear understanding of the testimony.⁹ Expert opinions must be based on some specialized knowledge and helpful to the trier of fact.¹⁰

Opinion testimony from experts regarding the credibility of witnesses has been the issue in many cases over the last few years. The proponent of such evidence was not precluded from presenting the testimony because the opinion embraced an ultimate issue in the case, but because either the opinion was beyond the scope of the experts' expertise (Rule 702) or because the evidence had been found to be not helpful to the trier of fact (Rules 701 and 702).¹¹ If, however, the opinion is simply based on the assumption that what the person said is the truth, the opinion may be admissible regardless of whether the opinion embraces an ultimate issue.¹² The fact that the opinion assumes the truth of the story may be disclosed on cross-examination. Depending on the inherent believability of the story, this will either undermine or strengthen the opinion.

The court presented the following analytical model for handling "ultimate issue" testimony:

a. Go back to Mil. R. Evid. 402, the basic rule for admissibility, and answer the following questions:

- (1) What is the legal relevance of the evidence?
- (2) What fact in controversy is being made more or less probable? and,
- (3) Will the opinion be helpful to the determination of that fact? Mil. R. Evid. 702. Confine the expert to his or her discipline.
- (4) Is there any other rule of evidence that makes the opinion inadmissible?

b. Weigh admissibility of the evidence under Mil. R. Evid. 403. If the proffered opinion satisfies these tests, it is admissible.¹³

The court then applied the analytical model to the facts and determined that the psychiatrist's opinion regarding Hill-Dunning's unconscious repression was relevant and helpful.¹⁴ The psychiatrist could not testify that, in her opinion, Hill-Dunning was being truthful. Clear precedent

required that conclusion.¹⁵ The psychiatrist could, however, testify "that her expert opinion was based upon her assumption that [Hill-Dunning] was being truthful."¹⁶ Although the opinion embraced the "ultimate issue" in the case (Hill-Dunning's state of mind), Rule 704 clearly allows such opinions when the expert is competent to express such an opinion and the opinion is helpful to the trier of fact. As the court noted, "[T]he fact that [the psychiatrist's] opinion was based upon her belief in what her patient was telling her is not of moment."¹⁷

Hill-Dunning provides practitioners with a model to use to evaluate "ultimate-issue" testimony. By providing this model, the court reaffirms its earlier positions on scientific evidence testimony and admissibility of opinions regarding credibility. Indeed, the court continues to provide workable models for the resolution of difficult evidentiary issues. MAJ Wittman.

A New Level of Appellate Relief?

Captain Robert L. Woods was charged with drunk and reckless driving and involuntary manslaughter. Facing trial by general court-martial, Woods submitted a resignation in lieu of court-martial under AR 635-120,¹⁸ some 32 days prior to trial. The request, however, was not forwarded until after the trial was over and Woods had been sentenced to be dismissed from the Army and confined for 7 months.¹⁹ On 7 February 1985, 58 days after trial, the general court-martial convening authority (GCMCA) approved Woods' conviction and forwarded Woods' request for resignation, recommending disapproval. The request was forwarded to the Assistant Secretary of the Army for Manpower and Reserve Affairs and on 2 April 1985, notwithstanding the convening authority's recommendation and Woods' conviction, the Assistant Secretary approved the resignation in lieu of court-martial. Accordingly, on appeal Woods argued that this action voided the action of the court-martial and that his conviction should be set aside. The Court of Military Appeals agreed.²⁰

The Court of Military Appeals found that it was "clear in this case that the Secretary of the Army and appellant mutually understood that the acceptance of the resignation would constitute an action in lieu of trial"²¹ and that the

⁹ Rule 701. Opinion Testimony by Lay Witnesses

If the witness is not testifying as an expert, the testimony of the witness in the form of opinions or inferences is limited to those opinions or inferences which are (a) rationally based on the perception of the witness and (b) helpful to a clear understanding of the testimony of the witness or the determination of a fact in issue.

¹⁰ Rule 702. Testimony by Experts

If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise.

¹¹ *United States v. Arruza*, 26 M.J. 234 (C.M.A. 1988); *United States v. White*, 25 M.J. 50 (C.M.A. 1987); *United States v. Petersen*, 24 M.J. 283 (C.M.A. 1987); *United States v. Cameron*, 21 M.J. 59 (C.M.A. 1985). (Each of these cases involved child sex abuse cases and attempts by witnesses to give opinions regarding the believability of the victim.)

¹² 26 M.J. at 262.

¹³ *Id.*

¹⁴ The court looked to *United States v. Gipson*, 24 M.J. 246 (C.M.A. 1987) for its analysis of the admissibility of opinion testimony.

¹⁵ *Supra*, note 11.

¹⁶ 26 M.J. at 263.

¹⁷ *Id.*

¹⁸ Army Reg. 635-120, Personnel Separations: Officer Resignations and Discharges (8 April 1968) (C16, 1 Aug. 1982).

¹⁹ The request was forwarded by the brigade commander the day after the trial was over.

²⁰ *United States v. Woods*, 26 M.J. 372 (C.M.A. 1988). This overturned the Army Court of Military Review's decision at 21 M.J. 856 (A.C.M.R. 1986).

²¹ *Id.* at 374, citing *United States v. Gwaltney*, 43 C.M.R. 536 (A.C.M.R. 1970).

promulgation of this regulation (AR 635-120) was a proper exercise of secretarial authority. Thus, the issue was limited to the timing of the Secretary's action and whether he could, *ex post facto*, void the action of a court-martial. The Court of Military Appeals held that he could. First, the court did not want the exercise of discharge authority to "depend upon a race between him [the Service Secretary] and the convening authority to make a judgment."²² Second, the court did not want a subordinate command's inactivity in processing a request for resignation to control the process, noting without comment but with clear astonishment, that the command in this case had not forwarded Woods' resignation request until 90 days after it was tendered.²³ Third, the court noted that just as an administrative action cannot deprive a court-martial of its proper power, a court-martial cannot divest the Secretary of his lawful authority.²⁴ Thus, the court set aside Woods' conviction and abated further proceedings.

How does this affect trial practice? In cases where an officer submits a resignation in lieu of court-martial, the GCMCA still decides whether to go ahead with the trial or to hold the proceedings in abeyance. Moreover, in 87% of the cases the Service Secretary agrees with the GCMCA's recommendation.²⁵ Common sense, therefore, dictates that all requests for resignation be expeditiously forwarded through the command and that the trial be held in abeyance when the GCMCA recommends *approval* of the resignation. Judge advocates should also be aware that the period spent processing the request to resign is not an exclusionary period under R.C.M. 707²⁶ and that a defense request for delay is necessary to attribute that time to the defense.²⁷ MAJ Williams.

Contract Law Note

Remedies of Unsuccessful Offerors: GAO Bid Protests

The Federal Government is required to obtain "full and open competition" through the use of competitive procedures when it acquires products or services.²⁸ A major tool

for enforcing this statutory mandate is the bid protest system. Although a vendor who believes that the government has violated a procurement statute or regulation may protest the violation of several forums,²⁹ the GAO is unquestionably the most frequently utilized forum. It receives approximately 3,000 complaints from dissatisfied bidders each year.

GAO bid protest regulations appear in Title 4 of the Code of Federal Regulations, Part 21. These rules were promulgated under the authority vested in GAO by the Competition in Contracting Act of 1984.³⁰ Department of the Army Pamphlet 27-153³¹ contains a discussion of the rules that was written only a few months after the rules were published. This note supplements the pamphlet through discussion of subsequent developments, including the new bid protest rules promulgated in December 1987.³²

Only Interested Parties May Protest

Any "interested party" may protest the violation of a statute or regulation.³³ An interested party is defined as an actual or prospective bidder whose direct economic interests would be affected by the award of a contract or the failure to award a contract.³⁴ The key elements in this definition are "actual or prospective bidder" and "direct economic interests."

Actual bidders include protesters who have submitted a bid.³⁵ The mere submission of a bid, however, is not sufficient. The bidder (actual or prospective) must be eligible for award.³⁶

²² *Id.* at 374.

²³ *Id.*

²⁴ *Id.* at 375.

²⁵ Per phone conversation with Military Review Boards Agency, 1 September 1988, the Secretary has agreed with the GCMCA's recommendation 87% of the time during the 1985 to March 1988 time frame. In some of the cases where there has been disagreement, however, the Secretary has chosen the more severe action and rejected the GCMCA's recommendation for approval of the resignation in lieu of court-martial. Moreover, in the last year, there has not been one case where the Secretary has voided a conviction after trial, as was done in *United States v. Woods*.

²⁶ Manual for Courts-Martial, United States, 1984, Rule for Courts-Martial 707.

²⁷ *United States v. Carlisle*, 25 M.J. 426 (C.M.A. 1988).

²⁸ 10 U.S.C. § 2301(a)(1) (1984).

²⁹ Protest may be to: (1) the contracting officer, (2) the General Accounting Office (GAO), (3) federal district courts, (4) the Claims Court, and (5) the General Services Board of Contract Appeals.

³⁰ Pub. L. No. 98-369, 98 Stat. 1200 (1984).

³¹ Dep't of Army, Pam. 27-153, Contract Law (27 Sept. 1986).

³² 52 Fed. Reg. 46,445 (1987).

³³ 4 C.F.R. § 21.0(a) (1988).

³⁴ *Id.* Bidder is used here in a general sense. It includes offerors in negotiated acquisitions as well as bidders in sealed bidding.

³⁵ *E.g.*, Comp. Gen. Dec. B-230086 (26 Feb. 1988), 88-1 CPD ¶ 204 (dismissal of protest where vendor did not submit a bid and protester's only interest was as a subcontractor).

³⁶ Comp. Gen. Dec. B-229577 (12 Jan. 1988), 88-1 CPD 21 (large business protester was not an interested party where acquisition was a small business set-aside); Comp. Gen. Dec. B-227797 (16 July 1987), 87-2 CPD ¶ 53 (suspended bidder was not an interested party because it was not eligible for award). See FAR 9.403-3 concerning ineligibility of debarred and suspended bidders.

Prospective bidders include protesters who assert their intention to submit a bid.³⁷ The prospective bidder standard is satisfied by the expression of an interest³⁸ in bidding as a prime contractor.³⁹ Potential subcontractors⁴⁰ and suppliers⁴¹ do not meet the standard.

An important exception to the prime contractor requirement is where the prime contractor is conducting an acquisition for the government.⁴² This exception would probably apply where a prime contractor in a Commercial Activities Program contract was given authority to conduct acquisitions for the benefit of the government.

The direct economic interest test is satisfied if the protester is "in line for award." To be "in line for award," the protester must allege that it would have received the award if the acquisition had been properly conducted.⁴³ For example,⁴⁴ the third low bidder would not be an interested party if its allegation was that the low bidder was nonresponsive. If the protest was sustained, the award would go to the second low bidder. The third low bidder would have to make allegations that would result in both the low and the second low bidders being ineligible for award.

The direct economic interest test is also satisfied where the protester makes allegations such that, if the protest is sustained, the opportunity to compete will be regained.⁴⁵ For example, consider the third low bidder who did not meet the "in line for award" test. This protester could become an interested party by asserting that the solicitation should be cancelled. The opportunity to participate in the subsequent resolicitation is considered a direct economic interest.⁴⁶

In addition to suppliers and subcontractors, the interested party requirement eliminates other common protesters:

unions,⁴⁷ trade associations,⁴⁸ and taxpayers.⁴⁹ If the protester does not satisfy the interested party requirement, counsel should coordinate a request for summary dismissal through the Contract Law Division, Office of The Judge Advocate General.⁵⁰

Discovery

The protester may submit a request for specific relevant documents with its protest.⁵¹ This limited aspect of discovery was added to GAO procedures in January, 1988. The GAO has indicated that it will apply Freedom of Information Act standards in determining which documents will be released to the protester.⁵² Requested documents must be provided to the protester and other interested parties with the report on the protest. Within two days of receipt of the report, the protester may request additional documents if the existence or relevance of the documents first became evident from the report.⁵³

If, at any stage of discovery, the contracting activity believes that the requested documents are not relevant or would not be releasable under the Freedom of Information Act, the documents and the reasons for withholding them must be forwarded through the Contract Law Division, Office of The Judge Advocate General, to the GAO. The GAO acts as final arbiter of releasability.⁵⁴

Conference on the Merits

Upon the request of an interested party or the government, the GAO may hold a conference on the merits of the protest.⁵⁵ The purpose of the conference is to clarify material issues. It is essentially an opportunity for oral argument. If a conference is held, no separate comments on

³⁷ Comp. Gen. Dec. B-228155 (13 Jan. 1988), 88-1 CPD ¶ 25 (protester did not submit a bid but alleged that protested restrictive requirements prevented submission).

³⁸ Comp. Gen. Dec. B-221096 (3 Feb. 1986), 86-1 CPD ¶ 121 (interest is determined at the time of the protest. Protester was an interested party notwithstanding earlier statements to the Army that it was going out of business and would not compete for the contract.)

³⁹ Potential subcontractors are not interested parties. See, e.g., Comp. Gen. Dec. B-226185 (5 Jan. 1988), 88-1 CPD ¶ 2; Comp. Gen. Dec. B-228373 (26 Jan. 1988), 88-1 CPD ¶ 76.

⁴⁰ Comp. Gen. Dec. B-226185 (5 Jan. 1988), 88-1 CPD ¶ 2.

⁴¹ Comp. Gen. Dec. B-225525.2 (14 Jan. 1987), 87-1 CPD ¶ 58.

⁴² See, e.g., Comp. Gen. Dec. B-227091 (10 Aug. 1987), 87-2 CPD ¶ 145.

⁴³ Comp. Gen. Dec. B-230035 (18 Mar. 1988), 88-1 CPD ¶ 290.

⁴⁴ Although this example concerns sealed bidding, the concept also applies to negotiated procurements. See, e.g., Comp. Gen. Dec. B-229695 (10 Feb. 1988), 88-1 CPD ¶ 135.

⁴⁵ Comp. Gen. Dec. B-229642 (29 Mar. 1988), 88-1 CPD ¶ 316 (unacceptable offeror is an interested party where it alleges that all other offers were unacceptable.)

⁴⁶ Comp. Gen. Dec. B-225326, B-225327, B-225879 (6 Mar. 1987), 87-1, CPD ¶ 260 (fourth low bidder was an interested party where it protested a defective specification which would require resolicitation).

⁴⁷ Comp. Gen. Dec. B-225335.2 (5 Feb. 1987), 87-1 CPD ¶ 124.

⁴⁸ Comp. Gen. Dec. B-223820 (7 Aug. 1986), 86-2 CPD ¶ 169.

⁴⁹ Comp. Gen. Dec. B-225687.2, B-225687.3 (11 Mar. 1987), 87-1 CPD ¶ 275.

⁵⁰ 4 C.F.R. § 21.3(m) provides for summary dismissal where a protest is untimely, invalid on its face, or otherwise not for consideration. GAO frequently dismisses protests on its own motion where it is evident that the protest does not satisfy its regulations. In other cases, it may dismiss the protest on the basis of additional information supplied by the agency. Dismissal obviates the requirement for an administrative report. It should be requested as early as possible in the protest proceedings.

⁵¹ 4 C.F.R. § 21.3(c) (1988).

⁵² 52 Fed. Reg. 46,445 (1987).

⁵³ 4 C.F.R. § 21.3(d)(3) (1988).

⁵⁴ 4 C.F.R. § 21.3(e) and (f) (1988).

⁵⁵ 4 C.F.R. § 21.5(a) (1988).

the government's protest report will be considered.⁵⁶ Instead, the protester and all other parties (including the government) must file comments on the report and conference within seven working days of the date of the conference.⁵⁷ The protest will be dismissed if the protester fails to file comments or request a decision on the existing record.⁵⁸

Fact Finding Conference

The fact finding conference is a recent addition to GAO protest procedures.⁵⁹ It may be held at the request of the parties or on the initiative of GAO to resolve a specific factual dispute which is essential to the resolution of the protest.⁶⁰ Preliminary indications are that fact finding conferences will be granted sparingly. As of August 1988, only three conferences have been held.

Witnesses testify under oath and are subject to examination by all parties. While the Federal Rules of Evidence serve as a guide,⁶¹ admissibility is determined in the sound discretion of the GAO presiding official.⁶² Findings of fact are made part of the protest decision.⁶³

Matters of Proof

Although the GAO will hold fact finding conferences in some cases, the vast majority of cases will be decided on the basis of the written record established by the protest, the agency protest report, and comments submitted on the agency report. The protester must submit all relevant evidence during the protest. GAO will not reconsider its decisions on the basis of evidence that could have been presented during the protest proceedings.⁶⁴

As a general matter, the burden of proof falls on the protester.⁶⁵ That burden is not met by the protester's mere statement of disagreement with the contracting agency.⁶⁶

Where there is no evidence other than the conflicting statements of the government and the protester, the protest will be denied.⁶⁷ An important exception to this rule is that GAO will resolve doubts concerning timeliness of a protest in favor of the protester.⁶⁸

The degree of proof and standard of review vary with the nature of the protester's allegations. In matters involving agency discretion, the protester must make a clear showing of unreasonableness, abuse of discretion, or violation of a procurement statute or regulation.⁶⁹ In cases where the protester challenges a solicitation requirement as being unduly restrictive, the burden is on the government to make a prima facie case that the restriction is reasonably necessary. The protester must then show that the requirement is clearly unreasonable.⁷⁰

Factual allegations must generally be proven by a preponderance of the evidence,⁷¹ but where a protester alleges bad faith on the part of a government official, a specific intent to injure the protester must be demonstrated by "virtually irrefutable" proof.⁷² Prejudicial motives will not be attributed to government officials on the basis of inference or supposition.⁷³ Proof of negligence or inefficiency is insufficient.⁷⁴

Attorneys Fees

GAO has statutory authority to award attorney's fees and bid preparation costs to successful protesters.⁷⁵ In the January 1988 modification of its rules, GAO eliminated specific criteria for the award of costs and fees.⁷⁶ The specific criteria generally resulted in the award of attorney's fees only in cases where the protester was unreasonably excluded from competition,⁷⁷ and where GAO's recommendation would not result in award or another opportunity to compete.⁷⁸

⁵⁶ 4 C.F.R. § 21.5(a)(2) (1988).

⁵⁷ *Id.*

⁵⁸ 4 C.F.R. § 21.5(a)(4) (1988).

⁵⁹ 4 C.F.R. § 21.5(b), effective January 15, 1988. 52 Fed. Reg. 46,445 (1987).

⁶⁰ 4 C.F.R. § 21.5(b) (1988).

⁶¹ 52 Fed. Reg. 46,445 (1987).

⁶² 4 C.F.R. § 21.5(b)(2) (1988).

⁶³ 4 C.F.R. § 21.5(b)(3) (1988).

⁶⁴ Comp. Gen. Dec. B-225057.3 (18 Aug. 1987), 87-2 CPD ¶ 171.

⁶⁵ Comp. Gen. Dec. B-228155 (13 Jan. 1988), 88-1 CPD ¶ 25 (GAO will not conduct an investigation to establish the validity of the protester's assertions.)

⁶⁶ Comp. Gen. Dec. B-228494 (1 Feb. 1988), 88-1 CPD ¶ 94.

⁶⁷ Comp. Gen. Dec. B-228339.2 (10 Feb. 1988), 88-1 CPD ¶ 131.

⁶⁸ Comp. Gen. Dec. B-227865.3 (13 Jan. 1988), 88-1 CPD ¶ 23.

⁶⁹ Comp. Gen. Dec. B-228544 (7 Jan. 1988), 88-1 CPD ¶ 13 (minimum needs determination); Comp. Gen. Dec. B-228490 (26 Jan. 1988), 88-1 CPD ¶ 77 (evaluation of proposals); Comp. Gen. Dec. B-228339.2 (10 Feb. 1988), 88-1 CPD ¶ 131 (solicitation cancelled because contracting officer determined lowest bid to be unreasonable); Comp. Gen. Dec. B-228537 (17 Feb. 1988), 88-1 CPD ¶ 158 (nonresponsibility determination).

⁷⁰ Comp. Gen. Dec. B-229772 (15 Mar. 1988), 88-1 CPD ¶ 267.

⁷¹ See, e.g., Comp. Gen. Dec. B-227880.4 (8 Feb. 1988), 88-1 CPD ¶ 120; Comp. Gen. Dec. B-228492 (19 Feb. 1988), 88-1 CPD ¶ 168.

⁷² Comp. Gen. Dec. B-228598 (22 Feb. 1988), 88-1 CPD ¶ 181.

⁷³ Comp. Gen. Dec. B-228404 (23 Feb. 1988), 88-1 CPD ¶ 185.

⁷⁴ Comp. Gen. Dec. B-224607.2 (9 Apr. 1987), 87-1 CPD ¶ 390.

⁷⁵ 31 U.S.C. § 3554(c)(1) (Supp. III 1985).

⁷⁶ 52 Fed. Reg. 46,448 (1987).

⁷⁷ E.g., Comp. Gen. Dec. B-226984 (20 June 1988), 87-2 CPD ¶ 4.

⁷⁸ Comp. Gen. Dec. B-225369.2 (15 July 1988), 87-2 CPD ¶ 45.

Under its new rules, a protester may be declared to be entitled to fees and costs if GAO determines that the Government has not complied with a statute or regulation.⁷⁹ It is reasonable to expect that GAO will become more liberal with attorney's fees. In the commentary on the January 1988 rules, GAO stated that "the costs of filing and pursuing a protest generally should be granted whenever a protest is sustained based on more than some technical violation of statute or regulation."⁸⁰ Undoubtedly, GAO will continue to award attorney's fees where no other practical relief is available.⁸¹ It also appears that fees will be awarded when a protester successfully attacks some limitation on competition, even if the protester regains the opportunity to compete.⁸² MAJ Ackley.

Legal Assistance Items

The following articles include both those geared to legal assistance officers and those designed to alert soldiers to legal assistance problems. Judge advocates are encouraged to adapt appropriate articles for inclusion in local post publications and to forward any original articles to The Judge Advocate General's School, JAGS-ADA-LA, Charlottesville, VA 22903-1781, for possible publication in *The Army Lawyer*.

August 1988 Mailout

In mid-August, the "1988 Legal Assistance Update" was mailed to Army legal assistance offices. This publication, which was developed from the deskbook used in the March 1988 Legal Assistance Course, contains current information regarding a wide range of substantive areas including marriage and divorce, support enforcement, taxation, consumer law, and the Soldiers' and Sailors' Civil Relief Act. The mailout also included Air Force "Shortbursts," reports from the National Consumer Law Center, a Consumer Information Catalogue, and newsletters published by the ABA Legal Assistance for Military Personnel (LAMP) Committee.

Consumer Law Notes

Dodge Pickups May Have Rear Visibility Problems

The Indiana attorney general's office has requested information regarding consumer complaints about the rear visibility of the full size 1987 Dodge Ram pickup truck. Consumers have alleged that the rear window in the cab reflects objects from in front of the vehicle into the rear view mirror. Although these reflections can be distinguished as ghost or false images during daytime, at night the reflections create a false impression that an oncoming vehicle is approaching and close behind the pickup. In addition, when the driver turns to the right to look out the back window, the reflections from the back window are confusing,

because objects behind the pickup do not appear, but the driver instead sees images of objects that are actually in front of the pickup.

As with all items published as "Consumer Law Notes," legal assistance attorneys can obtain more information by contacting Major Hayn, Autovon 274-7110 ext. 972-6368, commercial (804) 972-6368.

Fraudulent Sales of "Dali" Prints

In a Consumer Law Note published approximately a year ago, consumers were alerted to fraudulent sales of prints, wall sculptures, and lithographs purportedly created by Marc Chagall and Salvador Dali (see Legal Assistance Items, *Chagall or Charlatan?*, *The Army Lawyer*, Sept. 1987, at 63). That note expressed hope that the fraudulent sales, which had occurred primarily in Hawaii, would be curtailed as a result of law enforcement efforts. Unfortunately, it appears that related or similar scams continue to bilk money from consumers who intend to purchase original art works, reportedly costing consumers more than a billion dollars nationwide.

The Wisconsin attorney general has recently obtained a special order enjoining the Gallerie de Philipe, the Phonix Corporation, and their owner, Philips Koss, from engaging in unfair trade practices and methods of competition in the sale of art. The order prohibits these Madison-based companies from misrepresenting works of art as originals, from misrepresenting the resale value of these works, and from failing to disclose the use of photomechanical procedures on art production. The order additionally requires that the sale of any print or similar work of art for more than \$1,000 be accompanied by a disclosure and warranty statement that contains an explanation of the means by which the work was produced, a description of particular aspects of the work, and a statement regarding the artist's personal involvement in the work. The respondents are also required to maintain records that document the source and authenticity of the art they sell and that verify the seller's financial condition.

The Missouri attorney general has recently filed a lawsuit against another Madison-based company, Magnum Opus International Publishers, Inc. The suit is intended to stop Magnum Opus from selling allegedly bogus Dali prints for as much as \$5,000 each. The lawsuit alleges that Magnum Opus, which has also been the subject of consumer complaints in Wisconsin and New York, has misrepresented that the resale value of the prints will increase in the future, that the prints are a financial investment, and that there is a resale market for the prints. The suit is seeking a permanent injunction from making misrepresentations, restitution for consumers, civil penalties of \$1,000 for each violation of consumer protection laws, and additional forfeitures.

⁷⁹ 4 C.F.R. § 21.6(d) (1988).

⁸⁰ 52 Fed. Reg. 46,448 (1987).

⁸¹ E.g., Comp. Gen. Dec. B-228449.2 (29 Feb. 1988), 88-1 CPD ¶ 205 (GAO's original recommendation was award to the protester. Agency requested reconsideration on the basis that contract was substantially complete. GAO withdrew its award recommendation and awarded attorney's fees and bid preparation costs instead.)

⁸² E.g., Comp. Gen. Dec. B-229806 (2 Mar. 1988), 88-1 CPD ¶ 222 (Protester successfully challenged 30 mile geographic restriction in a solicitation for laundry services. GAO recommended resolicitation.); Comp. Gen. Dec. B-229065 (15 Jan. 1988), 88-1 CPD ¶ 40 (Incumbent bidder omitted from bidders mailing list and only one offer received on the solicitation. GAO recommended resolicitation.)

Legislative and Judicial Activity Regarding Credit Services Organizations

As previously reported (*see, e.g., Legal Assistance Items, Further Regulation of Credit Services Organizations*, *The Army Lawyer*, Dec. 1987, at 42), some states legislatures have regulated the conduct of credit services organizations, some of which charge consumers fees for providing services already mandated by federal law at no cost to the consumer or engage in other fraudulent practices. Those tracking the trend toward greater consumer protection in this area can now add Arizona to the list published in December 1987, which included Oklahoma, Louisiana, Texas, and Massachusetts. Similar to the state laws previously enacted, *Ariz. Rev. Stat. Ann. §§ 44-1701 through 44-1712 (1988)*, effective September 30, 1988, governs the practices of credit services organizations, which the statute defines as

one who, with respect to the extension of credit by others, sells, provides, performs or represents that he can or will sell, provide or perform any of the following services in return for the payment of monies or other valuable consideration:

- (a) Improving a buyer's credit record, history or rating,
- (b) Obtaining an extension of credit for a buyer.
- (c) Providing advice or assistance to a buyer with regard to either subdivision (a) or (b) of this paragraph.

Ariz. Rev. Stat. Ann. § 44-1701 (1988).

The new law identifies conduct prohibited to such organizations, including collection for a service before providing it, and charging for referral of a buyer to a retail seller who may extend credit to the buyer, if the credit extended is on the same terms as those available to the general public. The statute further specifies mandatory disclosures, including general contract terms and the buyer's right of cancellation, and requires that the organization obtain a surety bond in a specified amount. Violations are subject to injunctions issued at the request of the state attorney general and buyers may also bring private actions for actual damages, which are not less than the amount paid by the buyer to the credit services organization plus attorneys' fees and costs, plus punitive damages.

Remedial action is possible even in the absence of such protective legislation. The Federal Trade Commission (FTC) has recently obtained a preliminary injunction against Action Credit Systems Inc., Rusnat Inc. (a related corporation), and their officers based upon charges that they misled consumers by falsely and deceptively claiming to improve credit reports and arrange for consumers to receive major credit cards. The injunction orders defendants not to misrepresent their credit services and prohibits them from dissipating their assets and destroying or altering their business records.

Action Credit, a California-based company, sold credit card procurement and credit improvement services to consumers through newspaper, television, and radio advertisements, promising that the company would issue Visa or MasterCard charge cards "regardless of [the applicant's] credit history" and assuring consumers with poor credit ratings that "Action Credit will help clean it up." Among other allegations, the FTC asserts that Action

Credit falsely claimed that the Federal Fair Credit Reporting Act (FCRA), 15 U.S.C. § 1681 (1982), allowed it to remove negative information, such as bankruptcies, from credit reports and failed to fulfill their promise of a full refund to clients who did not receive credit cards as a result of its services. The FTC believes that several thousand consumers paid between \$95 and \$650 each for Action Credit's services.

Even better results were recently obtained in New Jersey, where two operators of a "credit repair clinic" were sentenced to prison terms and a third received a suspended sentence after all three pleaded guilty to criminal fraud charges brought by the U.S. Attorney's office in U.S. District Court in Trenton. The three included the president of Credit-Rite, Inc., and two others who worked for the "credit repair" company, which was one of the largest in the country until it ceased operations in early 1987. The New Jersey-based company operated 29 credit repair franchises in 13 states (Delaware, Florida, Kentucky, Maryland, Massachusetts, Missouri, New Jersey, Ohio, Pennsylvania, Rhode Island, Tennessee, Texas, and Virginia) and the District of Columbia, charging consumers between \$500 and \$700 for its services.

In addition to this criminal prosecution, the FTC brought a civil action against Credit-Rite and its officers in early 1988, charging that the clinic misled consumers by falsely and deceptively claiming that it could substantially improve their credit records and by failing to honor its 100% money-back guarantee. While this action is still pending with respect to two of the three who were criminally prosecuted, the FTC has entered a consent agreement with Jeffrey Roberts, the former president of Credit-Rite. Pursuant to the agreement, Roberts: 1) is prohibited from misrepresenting the rights and remedies available under the federal FCRA as well as the company's ability to improve consumers' credit reports, 2) must notify prospective clients that they have "no legal right to have accurate information removed" from their credit files and must inform them for what period of time this information may lawfully be reported, 3) must suggest that prospective clients contact the FTC for more information about the FCRA, 4) may not misrepresent refund policies and 5) must promptly and fully honor "money back" and "satisfaction" guarantees.

While this consent agreement is frustrating because it amounts to a promise by Roberts that he will stop violating federal law, which he was obviously obligated to do even in the absence of the consent agreement, legal assistance attorneys can provide a greater service than either the FTC (through its consent agreements) or the "credit repair" companies (which fraudulently promise services they cannot provide) by alerting clients to the protections available under the FCRA and applicable state laws. In addition, consumers may be able to rebuild positive credit histories through the responsible use of credit.

Recognizing that credit reports may be damaged by missed payments on credit cards or other financial obligations due to unexpected or isolated circumstances such as sudden job loss or large medical bills, some banks will issue "secured" or "collateralized" credit cards. These credit plans require the recipient to deposit money in the bank, which then issues a line of credit equal to 50% to 100% of the deposit providing the consumer agrees to forfeit all or part of the deposit upon failure to repay any debt acquired

through use of the card. Consistent payment on such accounts demonstrates that the consumer is credit worthy, eventually enabling the consumer to obtain credit on more favorable terms. Bankcard Holders of America, 333 Pennsylvania Avenue, S.E., Washington, D.C. 20003, a national nonprofit consumer credit organization, maintains a national list of banks that issue credit cards on such terms and has published a pamphlet detailing actions consumers can take to improve their credit profiles without paying large sums to credit clinics.

Credit Card Companies Court Consumers

Experts indicate that the credit card market is saturated and that, as a result, competition for new customers is fierce. Banks have found few ways to obtain new customers other than luring them away from other credit cards with a variety of incentives. These enticements include: reduced annual interest rates and fees; credit toward frequent flier program for all purchases; discounts on air travel, hotels, and car rentals; medical and legal assistance for travelers; double warranties on appliances; free collision coverage on car rentals; insurance against theft, loss, and fire for 90 days on all purchases; and rebates on all purchases. MAJ Hayn.

Tax Note

IRS Issues Temporary Regulations Describing Floor On Miscellaneous Deductions

Among the many changes made by the 1986 Tax Reform Act was a provision allowing miscellaneous itemized deductions only to the extent that they exceed two percent of a taxpayer's adjusted gross income. The Tax Reform Act of 1986, Pub. L. No. 99-514, 100 Stat. 2085 (1986) [hereinafter 1986 Act]. The Treasury Department has recently issued temporary regulations providing guidance with respect to this provision, which is commonly referred to as the "two percent floor". Treas. Temp. Reg. §§ 1.62-1T, 1.67-1T, 1.67-2T, and 1.67-3T.

The floor on miscellaneous deductions makes it extremely difficult for most soldiers to claim any deduction for itemized miscellaneous expenses on their federal income tax returns. For example, a soldier with an adjusted gross income of \$30,000.00 may deduct itemized miscellaneous expenses only to the extent they exceed \$600.00 (\$30,000.00 × 2%).

Although the "two percent floor" imposes a severe limitation on miscellaneous deductions, it is important to recognize that not all deductions are subject to the floor. Among the deductions not subject to the floor are moving expenses, interest, taxes, charitable contributions, medical expenses (which are subject to a 7.5% floor), and casualty and theft losses. The major deductions to which the floor does apply are those for tax preparation and tax services, hobby expenses, nontrade or nonbusiness expenses incurred to produce income, and unreimbursed employee business expenses.

In the past, soldiers could claim itemized deductions for several relatively insignificant items, such as unreimbursed expenditures for fatigue uniforms, uniform insignia, professional dues, costs of subscriptions to professional journals, and unreimbursed educational and entertainment expenses. Although these types of miscellaneous deductions may still be claimed to the extent they exceed the 2% floor, the floor

effectively eliminates the deduction of such minor items for most soldiers because they simply do not have enough such deductions to exceed the 2% floor. Congress intended this result because it believed that allowing these minor deductions fostered complexity in the law resulting in administrative and enforcement problems for the IRS and record keeping problems for the taxpayer.

Another problem that may affect soldiers claiming miscellaneous deductions is that the 2% floor applies after all other limitations or restrictions are applied to the deductible amount. For example, the new 80% limitation on meal and entertainment expenses is imposed first and the remaining deduction is subject to the 2% floor. I.R.C. § 274(n) (West Supp. 1988); Treas. Temp. Reg. § 1.67-1T(a)(2).

Congress also changed the framework for deducting employee business expenses in the 1986 Act. Prior to 1986, expenses for travel, meals, and lodging while away from home and unreimbursed employee transportation expenses could be claimed as an adjustment to income. Thus, soldiers could claim all of these expenses without filing an itemized return. Under the new law, however, these types of unreimbursed employee business expenses are treated as itemized deductions subject to the 2% floor. The types of unreimbursed employee business expenses soldiers may claim include travel (not related to change of station moves), entertainment and meal expenses that are necessary and ordinary to serving in the military, educational expenses, professional dues, and home office expenses. As a result of the 2% floor, at least a portion of these unreimbursed expenses will be disallowed.

Expenses incurred for the production of nonbusiness income are also subject to the 2% floor. Under section 212 of the code, ordinary and necessary expenses are deductible as itemized miscellaneous deductions under three separate categories: expenses for the production of income, expenses for the management, conservation, or maintenance of property held for the production of income, and expenses in connection with the determination, collection, or refund of any tax. I.R.C. § 212 (West Supp. 1988). The types of expenses soldiers can claim under these categories include service fees paid to banks, trustees, or other custodians for managing property, IRA trustee administrative fees, safety deposit box fees, tax counsel and tax preparation fees, and investment advisory fees. Soldiers who rent property may continue to deduct expenses relating to the rental property without regard to the 2% floor by claiming these deductions on Schedule E, Form 1040.

One of the more controversial issues addressed by temporary treasury regulations is the application of the miscellaneous itemized deduction provision to holders of interests in pass-through entities. Treas. Temp. Reg. § 1.67-2T. An investor in a pass-through entity must now separately take into account as an item of income and expense an amount equal to the allocable share of the pass-through entity's "affected expenses" to determine taxable income. These regulations are the result of Congress's recognition that some individuals could attempt to shift miscellaneous itemized deductions to partnerships, S corporations, or other entities to avoid the 2% floor.

The temporary regulations identify the following as pass-through entities: grantor trusts, partnerships, S corporations, common trust funds, nonpublicly offered regulated

investment companies (RICs), and real estate mortgage investment conduits (REMICs). Treas. Temp. Reg. § 1.67-2T(g)(1) and § 1.67-3T. Although there is a catchall for similar entities, the temporary regulations specifically exclude estates, trusts (other than grantor trusts), cooperatives, and real estate investment trusts from the list of pass through entities. Temp. Treas. Reg. § 1.67-2T(g).

The Miscellaneous Revenue Act of 1988 will eliminate the application of the pass-through rules to publicly offered RICs (mutual funds). Thus, mutual fund expenses will not be passed through to shareholders. The 1988 Revenue Act permanently extends the one-year delay in the application of the 2% floor to mutual fund expenses found in last year's Revenue Act. Revenue Act of 1987 10104(a).

The disallowance of deductions because of the 2% floor is often unavoidable. Taxpayers should be sure, however, to charge expenses properly allocable to a trade, business, or rental property directly to those activities by claiming the deduction on either Schedule C, Form 1040, for business expenses or Schedule D, Form 1040, for rental activity expenses. Some taxpayers involved in business activities may also benefit by characterizing themselves as independent contractors and not as employees because the expenses of independent contractors are not subject to the floor. The service recently issued a list of twenty factors that distinguish employees from independent contractors. Rev. Rul. 87-41, 1987-1 C.B. The presence of the new 2% floor will require legal assistance attorneys involved in tax preparation to distinguish and categorize various expenses to help generate the maximum possible deduction for clients. MAJ Ingold.

Estate Planning Note

Holographic Will Not Admitted to Probate

Soldiers trying to avoid the expense or inconvenience of seeing a lawyer to draft a will should take heed of a recent Arizona case, *In re Estate of Muder*, 156 Ariz. 326, 751 P.2d 986 (1988). In *Muder*, the testator filled in the blanks of a printed will form in his own handwriting giving his entire estate to his second wife. This will was initially admitted into probate. Two of the testator's daughters by a previous marriage, however, appealed the decision admitting the will to probate and contended that their father died intestate.

An appellate court agreed with the daughters. The court first found that the will did not qualify as a formal, witnessed will because it was not witnessed correctly and the self proving affidavit contained on the form did not conform to state statutory formalities. The court went on to consider the argument of the testator's surviving spouse, who argued that the will nevertheless was valid as a holographic will.

Arizona recognizes unwitnessed wills if the signature and all material provisions are in the testator's hand. Ariz. Rev. Stat. § 14-2503 (1988). The court found, however, that without the printed language the handwritten portion of the document stated neither a testamentary nor a donative intent. According to the majority, in order to be valid as a holographic will the intent of the testator must be evident from the handwritten portion of the document only.

One dissenting judge argued that the will was valid as a holographic will because the intent of the testator was clear when the typed portion was considered along with the handwritten portion and the principle of the Uniform Probate Code, adopted by Arizona, is to discover and make effective the intent of a decedent. Ariz. Rev. Stat. § 14-1102(B)(2) (1988), derived from Uniform Probate Code § 1-102(b)(2). According to the dissent, courts should accept as valid holographic wills that incorporate by reference printed or typed matter that is not distributive. Under this view, it is unrealistic to expect a testator to add the words "I leave to" to a distributive bequest when the printed will already includes this phrase.

The risks of completing printed, fill-in-the-blank form wills, although perhaps fairly obvious to those trained in the law, are not quite so apparent to the general public. These documents can be quite misleading because they refer to particular state laws, contain legal terms, and look official. Soldiers should be aware that, despite their outward appearances, these forms will seldom accomplish the soldier's testamentary goals when completed without the help of an attorney. MAJ Ingold.

Family Law Notes

Court Invalidates Change of Beneficiary on Life Insurance Policy

In divorce and separation actions involving minor children, one spouse is frequently required to designate minor children as beneficiaries of life insurance policies to ensure the children's support on the death of the insured parent. This purpose could be thwarted if the parent failed to comply with the requirement and instead designated a third party as beneficiary. The Washington State Supreme Court addressed this issue recently and held that an insured cannot validly change the beneficiary of an insurance policy that a divorce decree requires continued for the benefit of minor children.

In *Aetna Life Insurance Co. v. Bunt*, 110 Wash. 2d 368, 754 P.2d 993 (1988), the insured, George Bunt, entered into a separation agreement with his wife which required him to name his two children as irrevocable beneficiaries of a life insurance policy available to him as an employment benefit. He agreed to maintain the policy for the children's benefit during their minority and to retain ownership of the policy as his separate property. The parties' separation agreement was subsequently incorporated into a divorce and dissolution decree which also specifically required Bunt to name the children as beneficiaries.

After the divorce was final, Bunt remarried and, contrary to the court order, named his new wife as the beneficiary of the policy. Bunt died a short while later and his second wife, former spouse, and two children claimed the proceeds under the policy. The insurance carrier submitted the proceeds to the court for distribution.

The trial court directed that the insurance proceeds be paid to the insured's first wife as guardian for the children. The court of appeals reversed this order and instead granted the second wife one-half of the insurance proceeds if she could show in a separate proceeding that the last premium was paid out of community funds.

The insured's second wife appealed this decision to the state supreme court, arguing that the insured's two children were mere creditors of his estate and thus were excluded by state law from sharing in the life insurance proceeds. The supreme court disagreed, reasoning that claims for child and spousal support were not debts but were, rather, obligations arising out of parental status and public policy. The court also noted that a court order imposing payment obligations does not create a debtor-creditor relationship between child and parent. Thus, the court ruled that the children could assert a claim against the insurance proceeds despite the existence of a state statute exempting insurance proceeds from legal process to enforce debt claims. The court also found that the insured's right to deal freely with the insurance policy was restricted by the terms of the dissolution decree. According to the court, the children held a vested equitable interest in the proceeds of the policy which could not be defeated by a subsequent change of beneficiary and were, consequently, entitled to the proceeds from the policy.

Although the result reached in *Bunt* could change under different facts, most state courts regard the duty of parents to provide support as being fundamental to the public interest and therefore will be reluctant to uphold a change of beneficiary designation even though it complies with the terms of the insured's contract with the carrier. Accordingly, clients agreeing in separation agreements to name

children as beneficiaries of life insurance proceeds should consider the promise irrevocable. MAJ Ingold.

Former Spouses' Protection Act Benefits: Charting the Requirements

The "Legal Assistance Items" section of *The Army Lawyer* has previously included a chart reflecting the circumstances under which former spouses may receive various benefits under the Uniformed Services Former Spouses' Protection Act, Pub. L. 97-252, Title X, 96 Stat. 730 (1982) (see Legal Assistance Items, *Former Spouses' Protection Act Benefits*, *The Army Lawyer*, Apr. 1988, at 60). Since that time, additional health care benefits have become available because there is now a group health care plan in which former spouses can participate.

The following chart updates the April 1988 chart to reflect this change. Additionally, the notes for this new chart are more extensive, especially regarding benefits for former spouses of those who have retired from the reserve components.

Legal assistance attorneys may want to use this chart, with or without the notes, as part of domestic relations handouts developed for clients. It could also be useful as a handout for Commanders' Calls and other classes taught by legal assistance attorneys. MAJ Guilford.

FORMER SPOUSE ELIGIBILITY FOR BENEFITS UNDER THE UNIFORMED SERVICES FORMER SPOUSES' PROTECTION ACT¹

BENEFITS FOR FORMER SPOUSES²

LENGTH OF TIME
THAT MARRIAGE OVERLAPS
WITH SERVICE CREDITABLE³
FOR RETIREMENT PURPOSES

	Division of Retired Pay ⁴	Designation as an SBP Beneficiary ⁵	Direct Payment ⁶			Health, Care ⁷			Commissary ¹¹	PX ¹¹
			Child Support	Alimony	Property Division	Transitional ⁸	Full ⁹	Insurance ¹⁰		
0 years to less than 10	X	X	X	X				X		
10 years but less than 15	X	X	X	X	X			X		
15 years but less than 20	X	X	X	X	X	X		X		
20 or more years	X	X	X	X	X		X	X	X	X

Notes:

1. Pub. L. 97-252, Title X, 96 Stat. 730 (1982), as amended. This chart reflects all changes to the Act through the amendments in the National Defense Authorization Act for Fiscal Year 1987, Pub. L. 99-661 (1986).
2. For guidance on obtaining a military identification card to establish entitlement to some of these benefits, see Army Regulation 640-3. Former spouses of reserve component soldiers may be entitled to these benefits, but the rules are somewhat complex; see the following notes for the applicable benefits.
3. This chart assumes that the soldier serves long enough to retire from an active duty or a reserve component of the Armed Forces (i.e., that (s)he has 20 years of service creditable for retirement purposes).
4. At least one court has awarded a portion of military retired pay to a spouse whom the retiree married after he retired. *Konzen v. Konzen*, 103 Wash.2d 470, 693 P.2d 97 (1985).
5. Federal law does not create any minimum length of overlap for this benefit; the parties' agreement or state law will control a former spouse's entitlement to designation as an SBP beneficiary.
6. See 10 U.S.C. §§ 1408(d) & 1408(e) and 32 C.F.R. Part 63 for further guidance on mandatory language in the divorce decree or court-approved separation agreement. The former spouse initiates the direct payment process by sending a written request to the applicable finance center.
7. To qualify for any health care provided or paid for by the military, the former spouse must be unremarried and not covered by an employer-sponsored health care plan; see 10 U.S.C. §§ 1072(F) & 1072(G). DA interpretation of this provision holds that termination or annulment of a subsequent marriage does not revive this benefit. These restrictions, however, do not limit eligibility to enroll in the civilian health care insurance plan.
8. "Transitional health care" is created by Pub. L. 98-525, § 645(c) (which is not codified), and it includes full health care for 2 years after the date of the divorce. At the end of this period, the former spouse is eligible to enroll in the civilian group health care plan negotiated by DOD; see note 10. Note, however, that if the divorce decree is dated prior to April 1, 1985, a "20/20/15" former spouse (i.e., one married to the soldier for at least 20 years, and the soldier has at least 20 years of service that are creditable for retirement purposes, and the marriage overlaps at least 15 years of the creditable service) of an active duty retiree is entitled to full health care; see 10 U.S.C. § 1072(G). A "20/20/15" former spouse of a retiree from the reserves with a divorce decree dated before April 1, 1985, is entitled to full health care only if the retiree survives to age 60 or if (s)he elected to participate in the Reserve Component Survivor Benefit Plan upon becoming retirement eligible.
9. "Full health care" includes health care from military treatment facilities and that provided through CHAMPUS. A former spouse of a reserve component retiree is eligible for this benefit upon the retiree's 60th birthday (or on the day the retiree would have been 60 if (s)he dies before reaching age 60) if (s)he meets the normal qualification rules (i.e., an unremarried 20/20/20 former spouse who is not covered by an employer-sponsored health care plan); see 10 U.S.C. § 1076(b)(2).
10. The Department of Defense has negotiated a civilian health care insurance plan for any person who was formerly entitled to military health care but who subsequently has lost the entitlement (e.g., soldiers who ETS and former spouses who do not qualify for health care from the military). The military does not pay for or subsidize the premiums for this insurance, but the plan includes a guaranteed insurability provision if the former spouse (or other eligible person) enrolls soon after losing the entitlement to military health care. For further information, contact the Mutual of Omaha Insurance Company and ask about the Uniformed Services Voluntary Insurance Program.
11. Pursuant to service regulations, commissary and PX benefits are to be available "to the same extent and on the same basis as the surviving spouse of a retired member. . . ." Pub. L. 97-252, Title X, § 1005, 96 Stat. 737 (1982); see Army Regulation 640-3. The date of the divorce is no longer relevant for commissary and PX purposes. See Pub. L. 98-525, Title IV, § 645, 98 Stat. 2549 (1984) (amending Uniformed Services Former Spouses' Protection Act § 1006(d)). The former spouse must be "unremarried," and termination or annulment of a subsequent marriage does not revive these benefits. Qualified former spouses of reserve component retirees receive commissary and PX benefits when the retiree reaches age 60 (or when (s)he would have reached age 60 if the retiree dies before that time, but in such cases the entitlement arises only if the retiree elected to participate in the Reserve Component Survivor Benefit Plan when (s)he became retirement eligible; see AR 640-3). Notwithstanding the provisions of the Act and the regulation, however, the extent of commissary and exchange privileges in overseas locations may be restricted by host-nation customs law.

Claims Report

United States Army Claims Service

The Army's Implementation of the Health Care Improvement Act of 1986

*Major Philip H. Lynch,
Chief, Medical Malpractice Branch*

Introduction

In response to the growing public perception of a medical malpractice crisis in the United States, Congress passed the Health Care Quality Improvement Act of 1986 (the Act).¹ Congress felt that the increasing occurrence of medical malpractice in the United States and the need to improve the quality of medical care required action on the national level.²

Within the Department of the Army, the Office of The Surgeon General (OTSG) and the Office of The Judge Advocate General (OTJAG) will share responsibility for implementation of the Act. Judge advocates can expect many questions from commanders of health care facilities, physicians and other health care providers (HCP's) involved in medical malpractice claims, and HCP's involved

in actions to restrict or suspend their medical credentials. This article will address implementation of the Act within the Department of the Army and discuss the effect of the Act on the investigation and settlement of medical malpractice claims filed under the Federal Tort Claims Act (FTCA).

Subchapter I of the Act

Subchapter I of the Act is intended to promote professional peer review activities, the process by which HCP's check the quality of medical care in hospitals. By analyzing past practices, HCP's hope to improve future performance and establish safer and more efficient hospital procedures. Subchapter I also protects members of a professional review

¹ 42 U.S.C. §§ 11101-11152 (1987) (amending 42 U.S.C. 11101-11152 (1986)).

² 42 U.S.C. § 11101 (1987).

body or staff and individuals providing information to professional review committees from liability in damages under federal or state law.³

Many physicians have sued hospitals and peer review committee members after hospital committees revoked the plaintiff's privileges to admit patients. Plaintiffs in these suits have alleged the hospital committee members unlawfully restrained the trade of medical practice and they have sought treble money damages under Federal anti-trust law.⁴ The Act is intended to provide immunity to participants in the peer review process and to encourage physicians to identify and discipline incompetent physicians.

In 1986 Congress enacted a separate statute which immunizes participants in quality assurance activities in military hospitals from civil liability if the HCP's acted in good faith based on prevailing medical standards.⁵ Therefore, military HCP's already had the qualified civil immunity created by subchapter I of the new Act.

Subchapter II of the Act of 1986

Subchapter II is intended to restrict the ability of incompetent physicians to move from state to state. The Act requires all hospitals, other health care entities who pay medical malpractice claims, and insurance companies to report payment of medical malpractice claims, judgments, and adverse professional review actions which affect the clinical privileges of a physician for a period greater than 30 days to the National Data Bank (NDB) maintained by the Department of Health and Human Services (DHHS).⁶

The NDB was supposed to have become operational on 14 November 1987. The implementation date has been delayed, however, because Congress has not yet appropriated the funds for DHHS to establish the data base.⁷

Subchapter II requires hospitals and insurance companies to report all medical malpractice settlements or payments in satisfaction of a judgment.⁸ Any entity that fails to report such a payment is subject to a \$10,000 fine

for each nonreported payment. HCP's are not entitled to due process procedures prior to submission of their names to the NDB.⁹ When operational, all payments will be reported to the NDB.¹⁰

Health care entities will also be required to report sanctions taken against any physician whose license is revoked, suspended, or otherwise restricted for more than 30 days to their State Board of Medical Examiners (state board). This includes any action where the physician accepts the revocation of clinical privileges rather than face disciplinary action. A health care entity can voluntarily report other licensed HCP's to their state board if the HCP's credentials are suspended for longer than 30 days. Each state board must, in turn, report the information to the NDB.¹¹

The statute originally authorized disclosure of NDB data to the involved practitioner, to health care entities conducting peer review activities, or parties involved in medical malpractice actions.¹² The statute was amended in 1987 to remove the language authorizing disclosure of NDB data to parties in a malpractice action, but does allow disclosure of NDB data in accordance with regulations of the Secretary of DHHS, or disclosure of such information to a party authorized under applicable state law.¹³

On 21 March 1988 DHHS published proposed regulations implementing the Act. The proposed regulations seek to limit disclosure of NDB data to attorneys or individuals acting on their own behalf who have filed an action in federal or state court against a hospital, and who request information regarding a specific HCP. The regulations would allow disclosure of information to attorneys or individuals representing themselves in medical malpractice actions only upon submission of evidence that the hospital failed to obtain information from the NDB prior to hiring an HCP as required by the Act.¹⁴ DHHS could resist any other requests for NDB data under the Freedom of Information Act by citing the confidentiality provisions of the Act and the Privacy Act. One possible argument for protecting data supplied by DOD is the continuing

³ 42 U.S.C. § 11111 (1987); see Igelhart, *Congress Moves to Bolster Peer Review: The Health Care Quality Improvement Act of 1986*, 316 New Eng J. Med. 960 (1987). The Act does not preclude actions under any federal or state law relating to civil rights action. See U.S.C. § 11111 # (a)(1)(D) (1987).

⁴ See e.g., *Patrick v. Burget*, 108 S. Ct. 1658 (1988), rehearing denied 108 S. Ct. 2921 (1988); *Marrese v. Interqual, Inc.*, 748 F.2d 373, (7th Cir. 1984), cert. denied 472 U.S. 1027 (1985); *Hoover v. Ronwin* 466 U.S. 558 (1984), rehearing denied, 472 U.S. 1027 (1985); *Oltz v. St. Peter's Community Hospital*, 656 F.Supp. 760 (D. Mont. 1987); *United States v. North Dakota Hosp Ass'n*, 640 F.Supp. 1028 (D.N.D. 1986). In addition to antitrust actions, physicians have sued hospitals and other physicians seeking reinstatement of privileges based on racial discrimination, professional discrimination (osteopaths versus medical doctors), defamation, and contractual theories; see Firestone, *Malicious Deprivation of Hospital Staff Privileges*, Legal Aspects of Medical Practice, May, 1986, at 6.

⁵ 10 U.S.C. § 1102 (1986); see Woodruff, *The Confidentiality of Medical Quality Assurance Records*, The Army Lawyer, May 1987, at 5.

⁶ 42 U.S.C. §§ 11101-11134 (1987); see also the legislative history which describes the inability of state licensing boards, hospitals, and medical societies to weed out incompetent or unprofessional doctors and even when such doctors have been disciplined, they have simply moved to another state. The Act requires hospitals and licensing boards to report all disciplinary actions and medical malpractice settlements to the National Data Bank (NDB) and to seek NDB data before granting privileges to new physicians. 1986 U.S. Code Cong. and Admin. News 6384.

⁷ Implementation of "Health Care Quality Improvement Act" Delayed: 10 Health Law Vigil 23 (1987).

⁸ 42 U.S.C. § 11131(a) (1987).

⁹ 42 U.S.C. § 11131(c) (1987).

¹⁰ 42 U.S.C. § 11131 (1987); See DOD Fact Sheet: The National Data Bank dated 26 October 1987. The fact sheet discusses the Department of Health and Human Services Inspector General recommendation that malpractice settlements under \$30,000 not be reported to the NDB.

¹¹ 42 U.S.C. §§ 11132-11134 (1987).

¹² 42 U.S.C. § 11137(b)1 (1986); see also the Privacy Act Systems Notice for the Health Care Quality Improvement Act of 1986 at 52 Fed. Reg. 177, 34721 (1987) One of the listed routine uses for NDB data is to attorneys who have filed a malpractice action or claim on behalf of a client in federal or state court.

¹³ 42 U.S.C. § 11137(b)1 (1987).

¹⁴ 53 Fed. Reg. 54,9267 (1988).

confidentiality of Quality Assurance data under 10 U.S.C. § 1102.¹⁵

The 1987 amendment to the Act also allows DHHS to collect user fees for health care entities who request information from the data bank.¹⁶ This will enable DHHS to make the NDB partially self-supporting. DHHS expects Congress to include funds in the FY 1989 DHHS budget for the awarding of a contract to establish and operate the NDB.¹⁷

DOD Implementation of the National Data Bank

On 21 September 1987 the Assistant Secretary of Defense (Health Affairs) and the Assistant Secretary of Health, Public Health Service, DHHS signed a Memorandum of Understanding (MOU) implementing DOD participation in the NDB.¹⁸ The MOU requires DOD to report all licensed HCP's found responsible for settled medical malpractice claims and medical malpractice suits lost by the United States, and also to report HCP's whose clinical credentials are revoked or suspended. The DOD Instruction implementing the MOU has not yet been issued in final form.¹⁹

The Act requires submission of the names of involved HCP's to the National Data Bank following payment of a medical malpractice settlement or judgment. DOD has decided that there will be peer review of each filed medical malpractice claim.²⁰

The MOU requires DOD to have each claim where a payment is made analyzed and reports submitted in the following manner:

Standard Medical Care. Payments made for claims in which the patient was found to have received appropriate care should be reported under the name of the primary physician.

Minor deviation from standards of care. When payments are made for claims in which the patient was found to have received care that was substandard in minor respects, a separate report shall be submitted for each practitioner found to have provided substandard care.

Major deviation from standards of care. When payments are made for claims in which the patient was found to have received care that was substandard in major respects, a separate report shall be submitted for each practitioner found to have provided substandard care.²¹

Payments made for claims or in satisfaction of a judgment where there is a deviation from the standard of care but outside the control of HCP's will not be reported to the NDB. The MOU gives three examples of such incidents: power failure, accidents unrelated to patient care, and mislabelling of drugs by the supplier.²²

The most controversial section of the MOU is the requirement to report the name of the primary physician to the NDB when a military hospital's peer review committee determines that the standard of care has been met. If a claim has been paid, at least one physician's name will be reported to the NDB. The actual effect of reporting a physician's name to the NDB remains unknown but military HCP's are concerned that future civilian employment will be affected by the entry of their names in the NDB, and they are particularly concerned with their names being sent to the NDB when their peers have determined they "met" the standard of care.²³

Military physicians who remain on active duty after completion of their residencies often cite their immunity from personal liability, under the Gonzales Act,²⁴ as one factor in deciding to stay on active duty. Staff physicians have tacitly accepted sometimes inadequate staffing and poorly

¹⁵ See *supra* note 5 and accompanying text.

¹⁶ 42 U.S.C. § 11137(b)(4) (1987).

¹⁷ Telephone Interview with Dr. Margaret Wilson, Department of Health and Human Services (13 Apr. 1988).

¹⁸ Memorandum of Understanding signed by the Assistant Secretary of Defense for Health Affairs and the Assistant Secretary of Health, Public Health Service, Department of Health and Human Services implementing the Health Care Quality Improvement Act of 1986, 21 Sept. 1987 [hereinafter MOU].

¹⁹ Draft DOD Instruction Memorandum of Understanding between the Department of Health and Human Services and the Department of Defense Relating to Requirements of Public Law 99-60 (sic), "The Health Care Quality Improvement Act of 1986," 21 Sept. 1987. The draft DOD instruction states that each Military Department shall prepare regulations establishing standards for professional review actions and due process appeal procedures of professional review actions using the guidance provided in Section 412 of the Act. (codified at 42 U.S.C. § 11112 (1987)). Section 412 of the Act requires health care entities to give physicians 30 days notice of a proposed decertification action against the physician. The notice must include the reasons for the action, the right of the physician to request a hearing, a summary of the rights in the hearing, the right to representation by an attorney and the right to have a record made of the proceedings. The draft DOD instruction does not indicate if the due process appeal procedures in Section 412 of the Act apply to the reporting of medical malpractice claims to the NDB.

In actions to limit, suspend or revoke clinical privileges Army Reg. 40-66, Medical Services: Medical Records and Quality Assurance Administration, para. 9-17 (31 Jan. 1985) [hereinafter AR 40-66], gives HCP's 10 days to request a hearing following notice of a proposed credentialing action. Once a hearing is requested, the chairperson of the hearing committee must schedule the hearing within ten duty days of the notification. HCP's have the right to consult legal counsel. Military counsel are not allowed to represent HCP's at a credentials committee hearing. HCP's can employ civilian counsel and the civilian counsel may attend the hearing but they cannot question witnesses or present legal arguments during the hearing. AR 40-66, para. 9-17; see also Health Services Command *SJA Newsletter* #3, dated 9 March 1988 which discusses credentials hearings and recommends that a hearing committee chairperson gives a respondent a minimum of ten days after notification to prepare for a hearing. The draft DOD Instruction requires compliance with the due process procedures of § 412 of the Act giving physicians the right to 30 days notice of a hearing and the right to an attorney.

The final DOD Instruction should clarify the due process procedures for credentialing actions and resolve the differences between AR 40-66 and the Act. Telephone interview with Dr. (Col) Edward Haines, Office of the Assistant Secretary of Defense (Health Affairs) Professional Affairs and Quality Assurance Branch (10 June 1988).

²⁰ MOU, para. (a)1.

²¹ *Id.*

²² MOU, para. (a)2.

²³ See Tomich, *Military Doctors Wary of New Data Collection*, U.S. Medicine, Jan. 1988, at 2.

²⁴ 10 U.S.C. § 1089 (1976).

equipped facilities in exchange for their immunity from personal civil liability. Military physicians are likely to become much more vocal in their dissatisfaction with support staff and facilities when the quality of patient care is affected and their exposure to national data base reporting is increased by patients who express their unhappiness with the military health care system by filing medical malpractice claims.

DOD has decided that physicians in graduate medical education (residents) will not be reported to the NDB.²⁵ Military staff physicians are likely to closely supervise residents caring for patients, because the staff physician will be reported to the NDB if a claim is settled even if the hospital peer review committee determines that the resident, and not the staff physician, failed to meet the standard of care. As the Act does not limit the reporting of residents to the NDB, military staff physicians will undoubtedly question why they will be treated differently from residents who often make independent patient care decisions.

In addition to reporting medical malpractice claims, the MOU between DOD and DHHS requires DOD to report all instances in which a DOD HCP's clinical privileges were denied, limited, restricted, or revoked by a DOD agency for reasons of incompetence or negligent performance. The Act requires reporting of such actions after an HCP's credentials have been limited for at least 30 days. The MOU does not establish such a 30 day period but appears to require the reporting of such actions for even a one day limitation of privileges.²⁶

DOD agencies will also be required to report all instances in which a DOD HCP is found guilty after appellate review, pleads guilty, or is discharged in lieu of court-martial for unprofessional conduct as defined in DOD directives.²⁷

The Assistant Secretary of Defense (Health Affairs), Dr. William Mayer, sent a memorandum to the Secretaries of the Military Departments on 26 April 1988 directing the reporting of medical malpractice claims data to DOD.²⁸ DOD will use the information to submit reports to the NDB, when operational, and to analyze medical malpractice data at DOD level. Dr. Mayer requested that the Military Departments submit data on all medical malpractice claims closed after 1 January 1988. Closed cases include claims denied, settled, or litigated. All litigated cases will be reported, regardless of outcome. Supplemental reports will be submitted to show the change in status of a claim or litigation. Three separate reports would be required when a claim is denied, when a judgment is rendered by a court, and when the judgment is modified on appeal.

To implement the DOD requirements, Staff Judge Advocates (SJA's) and Medical Claims Judge Advocates

(MCJA's) will be required to submit the DOD claims data form with all dental or medical malpractice claims transferred to U.S. Army Claims Service with or without a seven paragraph memorandum. SJA's/MCJA's will also be required to submit the DOD form for all dental or medical malpractice claims denied or settled within local authority.²⁹

CJA's/MCJA's will complete the DOD form in coordination with the risk manager of the medical or dental treatment facility (MTF/DTF) regarding the medical diagnoses and procedures involved in the claim, description of the claimant's injury and peer review.³⁰

Judge Advocates and the National Data Bank

The reporting of medical malpractice data will involve judge advocates in several ways. Claims judge advocates will be directly involved by providing their local military treatment facilities (MTF's) with copies of medical malpractice claims when the claims are filed to facilitate the initiation of professional review as well as completion of the DOD form described above.³¹

Claims judge advocates are encouraged to avoid participating in the deliberations of the MTF peer review or credentials committee to lessen the perception of the CJA as a participant in the process of identifying HCP's for reports submitted to the NDB and DOD.³² This is particularly important since the implementation of the NDB may make military HCP's less willing to aid the CJA investigating medical malpractice claims, or make the CJA slant his investigation toward no liability, since the long term impact of the NDB on medical careers is uncertain. CJA's are encouraged to conduct their claims investigation separate from any peer review activity. The military medical community should assess the quality of medical care rendered to a particular claimant in a separate deliberative process.

If CJA's do not advise the MTF peer review committee, another attorney in a local staff judge advocate's office will be designated to advise the peer review committee. At most installations, a judge advocate from the administrative law branch should be assigned to advise the peer review committee. The division of roles between the CJA and an administrative law attorney may be difficult to implement because MTF commanders prefer to receive advice from one attorney and they frequently discuss peer review and credentialing issues with the CJA. The local SJA should get involved as necessary, to explain the issues and resolve any problems.

Legal assistance attorneys may be involved in counseling HCP's who are identified as care providers in medical malpractice claims. Military HCP's and their civilian peers

²⁵ Telephone interview with Major Ronald Boyd, Quality Assurance Office, Office of The Surgeon General (3 Mar. 1988).

²⁶ MOU, para. (b).

²⁷ MOU, para. (c). See Dep't of Defense Directive 6025.11, DOD Health Care Provider Credentials Review and Clinical Privileging, 20 May 1988 which lists misconduct actions reportable to state licensing boards and professional disciplinary data banks.

²⁸ Dep't of Defense Memorandum, ASD-HA subject: Medical Malpractice Reporting, 26 Apr. 1988.

²⁹ Dep't of the Army Message 191730Z Aug, Subject: Reporting of Malpractice Claims. The DOD letter was attached to the subject message in its entirety.
³⁰ *Id.*

³¹ Dep't of the Army Message 291235Z Oct. 87, Subject: Reporting of Malpractice Claims. This message requires CJA's to notify local MTF/DTF Commanders when a claim is filed.

³² *Advising the Hospital Commander*, The Army Lawyer, Jan. 1987, at 47.

have expressed great concern about the effect of their inclusion in the NDB on their ability to obtain medical malpractice insurance and future employment.³³ Legal assistance attorneys should become familiar with the peer review process and the potential impact on an HCP's medical career.

Similarly, a judge advocate assigned to the Trial Defense Service must consider the adverse effect of a HCP-client's administrative separation or court-martial. Under the terms of the Memorandum of Understanding between DOD and DHHS, an HCP discharged administratively in lieu of court-martial or convicted at court-martial of unprofessional conduct will be reported to the NDB.³⁴ Therefore, a defense counsel representing an HCP must consider the effect of the NDB on his client's future employment in addition to considering the punishment that may result at

³³ See *supra* note 23 and accompanying text.

³⁴ See MOU, para. b.

trial. (Note that at present there is no authority for military counsel to represent HCP's in a credentialing action.)

Conclusion

Congress has mandated significant change in the military medical system with the enactment of the Health Care Quality Improvement Act of 1986 and the pending establishment of the National Data Bank. Judge Advocates should keep abreast of medical malpractice reporting requirements. Congress and DOD will closely monitor the reporting actions of the Military Departments to the NDB as a result of the recent criticism of quality of the military medical care. Judge Advocates should anticipate increased demands for legal advice from MTF/DTF commanders as well as HCP's seeking advice on the effect of the Act on their medical careers.

Claims Notes

Tort Claims Note

Claims for Lost Packages Handled by United Parcel Service (UPS)

Claims for lost, damaged or undelivered packages left at unit mail rooms or with unit headquarters by United Parcel Service (UPS) or its employees, should not be paid but should be sent to the local office of UPS for payment. By virtue of an agreement with the U.S. Army, UPS remains liable for damage and loss even though the package has been properly signed for by the authorized representative of the unit in question. The agreement is set out in Appendix B, Army Regulation 65-75. MAJ Brown.

Personnel Claims Note

Deduction for Lost Potential Carrier Recovery

Personnel from the General Accounting Office have informed USARCS that some field claims offices are waiving deduction of lost Potential Carrier Recovery (PCR) without authority.

When a claimant fails to provide timely notice of loss or damage to household goods or holdbaggage using the DD Form 1840/1840R, unless a claimant demonstrates "good cause," claims offices are required to deduct 100% of the lost PCR on claims received after July 1, 1988 (Personnel Claims Bulletin 96 (Revised), USARCS Claims Manual, 23 March 1988). For claims received prior to July 1, a 50% deduction is applicable on shipments involving Increased Released Valuation, although a 100% deduction is still applied to other types of shipments.

Paragraph 11-21, AR 27-20 (10 July 1987), narrowly defines "good cause." Unless a claimant's failure to provide timely notice results from hospitalization or officially recognized absence for a significant portion of the notice period,

or from substantiated misinformation concerning notice requirements given to the claimant by government personnel, field claims offices have no authority to waive deduction of lost PCR; only the Commander, USARCS may do so. If a claimant had other reasons for failing to provide timely notice that field claims personnel deem meritorious, approval for a waiver may be obtained from USARCS either telephonically or in writing. Mr. Frezza.

Recovery Note

"Impasse—No Response" Message

USARCS sent the following message to field claims offices in July.

SUBJECT: IMPASSED CARRIER RECOVERY

1. BECAUSE OF THE STRONG EFFORT MANY FIELD CLAIMS OFFICES ARE MAKING TO ELIMINATE THEIR CARRIER RECOVERY BACKLOGS, THIS SERVICE IS RECEIVING AN UNUSUALLY LARGE NUMBER OF FILES. IN REVIEWING OUR OWN PROCEDURES, WE HAVE DISCOVERED ONE WAY TO SPEED UP PROCESSING OF FILES FORWARDED AS IMPASSES.

2. WE ARE REQUIRED TO REVIEW FILES FORWARDED AS IMPASSES WHERE THE CARRIER HAS RESPONDED TO ASSURE THAT WE WOULD BE UPHELD BY THE GENERAL ACCOUNTING OFFICE IF THE CARRIER APPEALED THE OFFSET ACTION. THERE IS NOT THE STRONG NECESSITY FOR US TO REVIEW FILES WHERE A CARRIER HAS SIMPLY FAILED TO RESPOND WITHIN THE 120 DAYS. MARKING THESE FILES DIFFERENTLY WILL ENABLE US TO SPEED THE PROCESSING OF THESE DEMANDS.

3. PLEASE MARK IMPASSE FILES WHERE THE CARRIER HAS NOT RESPONDED WITH "IMPASSE—NO RESPONSE." PLEASE CONTINUE TO MARK IMPASSE FILES WHERE THE CARRIER'S

RESPONSE IS NOT ACCEPTABLE WITH "IMPASSE." THIS WILL HELP US IN OUR EFFORTS TO KEEP RECOVERY MONEY FLOWING IN TO USE IN PAYING CLAIMS.

Criminal Law Note

Criminal Law Division, OTJAG

Professional Responsibility

Army Regulation 27-1, Judge Advocate Legal Service, Has Been Revised

The following is a reiteration of the procedures established in Chapter 6, AR 27-1, by The Judge Advocate General (TJAG) for processing violations of the professional standards that apply to lawyers of the Judge Advocate Legal Service and to civilian lawyers who practice before tribunals pursuant to the Uniform Code of Military Justice (UCMJ).¹ Chapter 6, AR 27-1, has been modified slightly to streamline the processing of ethical complaints against lawyers and to enhance the roles of the Assistant Judge Advocates General.

Applicable standards

All Judge Advocates and civilian attorneys of the Judge Advocate Legal Service (JALS) are subject to the rules, statutes, directives, and regulations that govern the providing of legal services within the Army. The Army Rules of Professional Conduct for Lawyers, DA Pam 27-26, apply to all judge advocates, lawyers employed by the Army, and other lawyers who practice, or intend to practice, before tribunals conducted pursuant to the UCMJ or Manual for Courts-Martial (MCM). To the extent it does not conflict with the above, the American Bar Association (ABA) Code of Judicial Conduct applies to the performance of judicial functions.² Unless they are clearly inconsistent with the UCMJ, MCM, or the Army Rules, the ABA Standards for Criminal Justice apply to military judges, counsel, and clerical support personnel of Army courts-martial.³

Procedures for complaints

Matters pertaining to violations of ethical standards are coordinated by the Executive to The Judge Advocate General through the Criminal Law Division, Office of The Judge Advocate General. All complaints, inquiries, or correspondence, regardless of subject matter, should be directed to the Executive, Office of The Judge Advocate General.

No investigation of alleged professional responsibility derelictions may be conducted at any level without the approval of TJAG.⁴ TJAG, through the Executive, will refer allegations to a supervisory judge advocate⁵ for the appointment of a preliminary screening officer. Preliminary screening officers normally are Staff or Command Judge Advocates or Regional Defense Counsel.⁶ They may use subordinate officers to gather facts (take statements etc.); however, the preliminary screening officer must review the facts personally.⁷ The purpose of the preliminary screening is to assist the supervisory judge advocate in determining if the conduct in question constitutes a violation of the professional standards.⁸

Upon receiving the report of the preliminary screening officer, the supervisory judge advocate has three options.⁹ First, the complaint may be unfounded and the supervisory judge advocate so reports this fact to the Executive. Second, the violation may be minor or technical in nature, and one where only counseling is appropriate. In such cases, the supervisory judge advocate counsels the lawyer in question and informs the Executive of the action taken. Third, in those cases where sufficient evidence warrants further action, and the matter is too serious to be disposed of by the

¹ Manual for Courts-Martial, United States, 1984, Rule for Courts-Martial (R.C.M.) 109 permits The Judge Advocate General to prescribe rules for the professional supervision and discipline of all attorneys who practice in proceedings governed by the Uniform Code of Military Justice or the Manual for Courts-Martial.

² Army Reg. 27-1, Legal Services: Judge Advocate Legal Service, para. 6-3 () (hereinafter AR 27-1).

³ Army Reg. 27-10, Legal Services: Military Justice, para. 5-8 (18 Mar. 1988) (hereinafter AR 27-10).

⁴ AR 27-1, para. 6-5a. Prior approval is not required for investigations and administrative or disciplinary disposition of actions unconnected with professional standards. Para. 6-3c. Such misconduct, however, may violate Rule 8.4 Army Rules of Professional Conduct for Lawyers, if the dereliction involves a criminal act that reflects adversely on the lawyers honesty, trustworthiness, or fitness as a lawyer in other respects or is prejudicial to the administration of justice.

⁵ Normally the Major Command Staff Judge Advocate, or the Chief of the Trial Defense Service, or the Chief of the Trial Judiciary.

⁶ AR 27-1, para. 6-6a(1).

⁷ *Id.* para. 6-6b(1).

⁸ *Id.* para. 6-5b.

⁹ *Id.* para. 6-6b(2).

supervisory judge advocate, the matter is sent to the Executive for forwarding to the Assistant Judge Advocate General (AJAG) having supervisory responsibility over the attorney concerned.

Before the matter is forwarded to AJAG, the attorney concerned is provided a copy of the preliminary screening officer's report and may provide a written statement to be included in the matters forwarded to the AJAG. Normally, the attorney must respond in 14 days.¹⁰

The Assistant Judge Advocates General play a central role in the processing of allegations of violations of professional standards. These general officers will review the allegations, the screening officer's report, and any matters submitted by the attorney concerned, to determine the appropriate action to be taken in the case. They have three options.¹¹ First, the AJAG may feel more facts are needed. In that case the matter is returned to the screening officer, or the AJAG may appoint an investigating officer under AR 15-6. The investigating officer may use the informal procedures of AR 15-6 in the investigation.

Second, the AJAG may determine that a reasonable basis does not exist for believing a violation occurred. If so the AJAG will return the report to the Executive to close out the matter.¹² The Executive will inform the attorney concerned and the supervisory judge advocate.¹³

Third, upon completion of further investigation, if any, the AJAG may take appropriate action in the matter to include the issuance of a reprimand or admonition to the officer concerned.¹⁴ On more serious matters, however, the AJAG may refer the matter to the Professional Responsibility Committee (PRC).¹⁵

Many State bars require attorneys to report when they have been investigated for professional misconduct (whether or not the allegations are founded). It is intended that referral of an allegation to the PRC by the AJAG would be the point at which an attorney should report to their state bar pursuant to state or local bar reporting requirements.¹⁶ This is because the AJAG fills a role analogous to the state bar counsel. The state bar counsel, or disciplinary attorney, screens complaints.¹⁷ Under AR 27-1 procedures, the comparable function is performed by the AJAG. Hence, the referral of a matter to the PRC should be regarded by the attorney as the type of action that the attorney may be

required to report to their licensing authority or list when applying to a state bar for admission.

The Professional Responsibility Committee (PRC)¹⁸ is a body, appointed by TJAG, composed of at least three attorneys senior to the attorney concerned, that considers allegations and factual circumstances, and issues opinions on possible violations of the ethical standards. The PRC has no investigatory powers and will neither allow appearances by, nor communicate directly with, the attorney concerned, counsel, or witnesses. The PRC will not respond to any attempt to communicate directly with it and will refer any such communication to the Executive.¹⁹ If the PRC determines that it has insufficient facts on which to base a decision, the PRC may list specific questions in its report. The AJAG may then direct further investigation by the screening officer or the investigating officer under AR 15-6.²⁰

The PRC report, when complete, is forwarded to the AJAG. If the PRC finds that no violation has occurred, and the AJAG approves the finding, then the AJAG approves the report, the Executive notifies the attorney concerned, and the matter is closed.²¹

If the PRC finds that a violation has occurred, the AJAG forwards the matter through The Assistant Judge Advocate General (TAJAG) to TJAG for disposition.

Upon receipt of the investigation and the PRC's report, TJAG will take appropriate action. TJAG is not bound by the findings or recommendations of the preliminary screening officer, investigation, PRC report, or the recommendations of AJAG and TAJAG. Based on all available information, TJAG will determine what action is warranted. The attorney will be informed of the proposed action and will be permitted to show cause why TJAG should not take the action.²²

The Judge Advocate General may impose sanctions on the attorney ranging from counseling to suspension from practice before courts-martial.²³ TJAG may direct another officer to admonish, reprimand, or correct the attorney.

TJAG may also direct that any report of misconduct, or other finding of a violation of professional standards, be reported to the licensing authority of the attorney involved.²⁴

¹⁰ Id. para. 6-7.

¹¹ Id. para. 6-8.

¹² Id. para. 6-8b(1).

¹³ Id. para. 6-8b(1).

¹⁴ Id. para. 6-8b(3).

¹⁵ Id. para. 6-8b(2).

¹⁶ Id. para. 6-8c.

¹⁷ Standard 8.4, ABA Standards for Lawyers Discipline and Disability Proceedings, August 1983.

¹⁸ AR 27-1, para. 6-9.

¹⁹ Id. para. 6-9b.

²⁰ Id. para. 6-9d(3).

²¹ Id. para. 6-9d(2). If the AJAG disagrees with the committee finding of no violation, he may forward the matter, with the PRC report and his recommendation, through The Assistant Judge Advocate General to TJAG.

²² The attorney is given 10 days to respond. Paragraph 6-11a.

²³ AR 27-1, para. 6-11.

²⁴ Id. para. 6-11c.

Advisory Opinions

The PRC may also provide advisory opinions. Requests for advisory opinions will be forwarded to the Executive. Requests from judge advocates or civilian attorneys will be transmitted through appropriate technical channels and receive a recommendation at each level as to whether the question should be submitted to the PRC. Ultimately, the Executive decides if the PRC should consider the question, and in consultation with the AJAG having supervisory responsibility, decides whether and how the opinion should be publicized.²⁵ These provisions are not intended to restrict or intimidate the discussion of ethical matters throughout the Corps. The supervisory chain, to include the SJA and the regional defense counsel, should be consulted when ethical issues arise, and the Trial Counsel Assistance Program and the Trial Defense Service may be consulted for informal opinions. The Army Rules of Professional Conduct for Lawyers encourage the discussion and consultation of ethical issues. Supervisors have an obligation to make reasonable efforts to ensure that their subordinates conform to the professional standards.²⁶ Moreover, the Army Rules encourage subordinates to consult with their superiors on ethical matters.²⁷

Summary of actions under AR 27-1

Allegations of professional misconduct are processed in an expeditious manner. Short suspensions are given to the supervisory judge advocate and the screening officer. The AJAGs consider matters under AR 27-1 on a priority basis. Depending on the complexity of the case, it would be unusual for an allegation not to be resolved (even if review by the PRC is needed) in 120 days. The vast majority of complaints are resolved in less than 60 days.

Complaints are received from many sources. Former clients complain through the appellate system or through the

Office of The Inspector General. Allegations against a member of the Judge Advocate General's Corps concerning a violation of professional standards are referred through the Legal Advisor, Department of the Army Inspector General, to TJAG for handling pursuant to AR 27-1.²⁸ In addition to complaints from soldiers, complaints are also received from commanders, family members of soldiers, and other attorneys.

The most frequent allegations have involved misconduct that reflected adversely on the lawyer's honesty, trustworthiness, and fitness, or misconduct that was prejudicial to the administration of justice. These incidents represent a violation of Army Rule 8.4.²⁹ The two suspensions of counsel in the past two years have been for violation of the rules prohibiting conflicts of interest.

The most frequent unfounded allegations involved ineffective assistance of counsel. Another frequent area of unfounded complaints was the improper intimidation of witnesses by the trial counsel or the improper pressuring of an accused to choose a course of action not in their best interest by the defense counsel.

Conclusion

An allegation of an ethics violation is a serious matter, as evidenced by the necessity to obtain the prior approval of TJAG before such allegations are investigated. The procedures of AR 27-1 described above are designed to ensure that ethical allegations are investigated in a thorough, efficient, and fair manner. There are no "secret" procedures when allegations of professional misconduct are investigated, and all judge advocates and civilian attorneys of the JALS should become familiar with the applicable procedures. The provisions in AR 27-1 are followed in all cases.

²⁵ *Id.* para. 6-9b(2).

²⁶ Rule 5.1(b). Army Rules of Professional Conduct for Lawyers. The inclusion of ethical responsibilities of supervisory lawyers in the ABA Model Rules was new to civilian legal practice. Of course, in the military, leaders have always been responsible to supervise the conduct of their subordinates.

²⁷ Rule 5.2, Army Rules of Professional Conduct for Lawyers.

²⁸ AR 20-1, para. 5-3f.

²⁹ The Army Rules of Professional Conduct for Lawyers became effective as the professional standard for judge advocates on 1 October 1987 by direction of The Judge Advocate General. The applicable standards prior to 1 October 1987 were the ABA Code of Professional Conduct.

Guard and Reserve Affairs Items

Judge Advocate Guard and Reserve Affairs Department, TJAGSA

Military Justice Within the Reserve Components: A New Chapter in RC Dealings with the UCMJ

Lieutenant Colonel Carl T. Grasso (USAR)

Introduction

As all reserve component commanders and judge advocates are well aware, the Military Justice Amendments of 1987¹ profoundly changed and expanded Uniform Code of Military Justice (UCMJ) jurisdiction over reservists. These amendments have now been implemented in the latest revision of Army Regulation 27-10, "Military Justice," dated 18 March 1988,² with the addition of an entirely new chapter 21, "Military Justice Within the Reserve Components." The following is a fact sheet for commanders and judge advocates summarizing and commenting upon various features of new chapter 21 as it now affects the reserve as well as active components of the Army. Comments appear in brackets, and should not be construed as part of the regulation.

Fact Sheet

Revision of AR 27-10, Military Justice, 18 March 1988 Chapter 21, "Military Justice Within the Reserve Components"

I. Applicability

a. Implements Title VIII, National Defense Authorization Act for FY 1987 (Military Justice Amendments of 1987) and certain Rules for Courts-Martial.³

b. Amendments apply to offenses committed on or after 12 March 1987.⁴

c. As a matter of policy, reserve component (RC) commanders will not convene summary courts or give nonjudicial punishment until 1 July 1988.⁵

d. "Costs associated with disciplining RC soldiers will be paid out of RC funds."⁶

II. Status of Service Members Subject to UCMJ

a. "whenever they are in a title 10 USC duty status": active duty (AD), active duty for training (ADT), annual training (AT), Active Guard/Reserve (AGR) duty, or inactive duty for training (IDT).⁷

b. "IDT normally consists of weekend drills by troop program units, but may also include any training authorized by appropriate authority. For examples of IDT, see AR 140-1, paragraphs 3-4, 3-11, 3-12, 3-14, 3-14.1 and 3-30."⁸

[These above references to AR 140-1⁹ accordingly incorporate the following types of IDT during which the RC soldier is subject to UCMJ jurisdiction:

1. UTA (Unit Training Assembly), MUTA (Multiple Unit Training Assembly) and unpaid two hour meetings [e.g., Tuesday night administrative meetings].¹⁰ Lunch breaks and overnight periods such as overnight bivouacs are also included.¹¹ [It is believed that appropriate travel periods closely associated with a UTA, e.g. walking in a parking lot to one's car after sign-out, would also be included.]

2. Equivalent Training (ET)¹²

3. Regular Scheduled Training (RST)¹³

4. Additional Training Assembly (ATA)¹⁴

5. Readiness Management Assembly (RMA)¹⁵

6. "Training of individual soldiers in nonpay status."¹⁶

This last category includes "individual IDT in a nonpay training status when authorized by the appropriate OCONUS Army commander, ARCOM, GOCOM or the CG, ARPERCEN for their respective commands. Individual training opportunities for all eligible IRR soldiers with

¹ The Military Justice Amendments of 1987 were signed into law as Title VIII of the National Defense Authorization Act for Fiscal Year 1987.

² Army Reg. 27-10, Legal Services: Military Justice (18 Mar. 1988) [hereinafter AR 27-10].

³ AR 27-10, para. 21-1a.

⁴ Id. para. 21-1b.

⁵ Id.

⁶ Id. para. 21-2d.

⁷ Id. para. 21-2a.

⁸ Id., emphasis added.

⁹ Army Reg. 140-1, Army Reserve Mission, Organization and Training (1 Feb. 85) [hereinafter AR 140-1].

¹⁰ AR 140-1, para. 3-4.

¹¹ AR 27-10, para. 21-2a.

¹² AR 140-1, para. 3-11.

¹³ Id. para. 3-12.

¹⁴ Id. para. 3-14.

¹⁵ Id. para. 3-14-1.

¹⁶ Id. para. 3-30.

retirement point credit"¹⁷ are then listed subparagraphs a through v, including such things as "participation in approved training projects or using administrative skills in support of TPU and USAR activities,"¹⁸ "enrollment in approved extension courses,"¹⁹ "service as a member of a duly authorized board"²⁰ and "attendance at authorized conventions, professional conferences or appropriate trade association meetings related to the individual's mobilization specialty."²¹

It thus appears that UCMJ jurisdiction would attach during practically any form of "approved" training, whether in pay or nonpay status, so long as opportunity for retirement points is available, theoretically even to include working at home on correspondence courses.]²²

c. RC soldiers remain subject to UCMJ jurisdiction even after termination of title 10 status as long as "they have not been discharged from all further military service."²³

III. Status of the RC Commander

a. Must be in title 10 status for preferral or referral of court-martial charges; offering, giving or holding hearings under article 15; or vacating article 15 nonjudicial punishment (NJP) suspended sentences.²⁴

b. Need not be in title 10 status for forwarding charges; initiating or forwarding request for involuntary active duty; or action on NJP appeals.²⁵

IV. Involuntary Active Duty

a. RC soldier may be ordered to involuntary AD by the Active Component General Court-Martial Convening Authority (AC GCMCA)²⁶ [which would ordinarily be the active supporting installation for the reserve unit. Thus, a MUSARC or reserve GOCOM theoretically could have geographically scattered subordinate units subject to different GCMCA's. It would perhaps be useful for units, under the supervision of their higher headquarters in their chains of

command, to execute Memoranda of Understanding (MOU) with the appropriate GCMCA to cover local procedures for involuntary active duty, as well as other interactions between the unit and the GCMCA].

b. Allowable purposes: article 32 investigation;²⁷ trial by court-martial;²⁸ article 15 proceedings;²⁹ pretrial confinement (but only after order to involuntary AD for one of the other three reasons with approval by the Secretary of the Army or his designee).³⁰

c. RC soldier must be on AD before arraignment at General Court Martial (GCM) or Special Court Martial (SPCM) or before being placed in pretrial confinement.³¹

d. If a soldier is on AD, ADT or AT when the offense was committed, involuntarily extending him on AD does not require AC GCMCA action or Secretary of the Army approval "so long as action with a view toward prosecution is taken before the expiration of the AD, ADT or AT period."³² Such extensions must be completed in accordance with AR 135-200, chapter 8.³³

V. Special and General Courts-Martial

a. RC soldiers may only be tried by SPCM or GCM when on AD. The Secretary of the Army or his designee must approve these orders "before the RC soldier may be sentenced to confinement or deprived of liberty," including pretrial confinement.³⁴

b. As a matter of policy, a MUSARC commander's authority to convene GCMs or SPCMs is withdrawn.³⁵ [Note: a MUSARC commander would otherwise qualify as a GCMCA.]

VI. Summary Court-Martial

a. RC soldiers may be tried by summary court-martial (SCM) while in any title 10 status [i.e., while on IDT], as long as punishment is served during normal IDT periods.³⁶ [Accordingly, an SCM tried during IDT has no authority

¹⁷ *Id.*

¹⁸ *Id.* para. 3-30f.

¹⁹ *Id.* para. 3-30g.

²⁰ *Id.* para. 3-30i.

²¹ *Id.* para. 3-30n.

²² Interestingly, these provisions implement the expanded UCMJ jurisdiction contemplated in the Military Justice Amendments of 1987, which had been spoken against much earlier in hearings prior to the initial enactment of the UCMJ; Mr. Felix Larkin, Assistant General Counsel, Office of the Secretary of Defense, had stated "[W]e should not have for all purposes and all services jurisdiction over Reserve personnel when they are on inactive duty—while they are taking correspondence courses at home or . . . attending meetings or . . . wearing their uniform on parade and the various other provisions by virtue of which the Navy now [as of 1949] does have jurisdiction over their people." Hearings on H.R. 2498 Before a Subcomm. of the House Comm. on Armed Forces, 81st Cong., 1st Sess. 860 (1949). This statement was made many years before the adoption of the Total Force concept.

²³ AR 27-10, para. 21-5a.

²⁴ *Id.* para. 21-2c.

²⁵ *Id.*

²⁶ *Id.* para. 21-3c.

²⁷ *Id.* para. 21-3a.

²⁸ *Id.*

²⁹ *Id.*

³⁰ *Id.* para. 21-3b.

³¹ *Id.* para. 21-3d.

³² *Id.* at 21-4a. For discussion of such "actions," see U.S. v. Self, 13 M.J. 132 (C.M.A. 1982) and U.S. v. Caputo, 18 M.J. 259 (C.M.A. 1984).

³³ *Id.*, referencing Army Reg. 135-200, Active Duty Training for Individual Members (1 Aug. 85).

³⁴ *Id.* para. 21-8a.

³⁵ *Id.* para. 21-8b.

³⁶ *Id.* para. 21-7a.

to sentence an RC soldier to up to 30 days confinement. There is no specific requirement for the RC soldier on AD to have orders approved by the Secretary of the Army to receive a sentence of confinement at an SCM, but a reading of para. 21-8a requiring secretarial approval for involuntary AD even for a GCM or SPCM to sentence the RC soldier to any sort of confinement would certainly imply that an SCM would need at least this much.]

b. Either RC or AC summary court-martial convening authority (SCMCA) may refer charges against RC soldiers to trial by SCM.³⁷ [It is probable that FORSCOM, the continental US Armies or MUSARCs will adopt regulations which may restrict the ability of GOCOMs to convene SCM.]

c. The summary court officer must be on AD at the time of trial. An RC SCMCA may refer charges while on IDT.³⁸

VII. Nonjudicial Punishment

a. RC commanders may punish RC enlisted soldiers in their commands under article 15. HOWEVER, "[i]n particular, commanders are reminded of the policy in paragraph 3-2 [AR 27-10] that *nonpunitive or administrative remedies should be exhausted before resorting to NJP*"³⁹ [obviously applies to court-martial action as well].

b. RC soldiers may be offered NJP, have an open hearing under article 15 and receive punishment under article 15, all while in any title 10 status (including IDT).⁴⁰ [The regulation does allow for involuntary order to AD for article 15 proceedings,⁴¹ but does not suggest when such involuntary order to AD for NJP would be appropriate.] As noted earlier in section III, the RC commander may also be in any title 10 status.

c. RC officers may receive NJP from their AC or RC GCMCA or CGs in the RC officer's chain of command "unless further restricted by higher authority."⁴² [Thus, although the RC GCMCA has no authority to actually convene a GCM, he may still give NJP to RC officers within his command unless this authority is eventually restricted by a senior headquarters.]

VIII. Punishments

³⁷ *Id.* para. 21-7b.

³⁸ *Id.*

³⁹ *Id.* para. 21-6a, emphasis added.

⁴⁰ *Id.* para. 21-6b.

⁴¹ *Id.* para. 21-3a.

⁴² *Id.* para. 21-6d.

⁴³ *Id.* para. 21-7a.

⁴⁴ *Id.* para. 21-5b.

⁴⁵ *Id.* para. 21-9.

⁴⁶ UCMJ art. 15(b)(2)(c).

⁴⁷ Department of Defense Military Pay and Allowances and Entitlements Manual (DODPM), para. 80354b (C70, 7 Dec. 1982).

⁴⁸ AR 27-10, para. 3-19b.

⁴⁹ *Id.*

⁵⁰ *Id.* para. 21-11a.

⁵¹ *Id.* para. 21-11b.

⁵² *Id.* para. 21-12a.

a. The normal limitations of punishments under GCM, SPCM, SCM and article 15 are unaffected [and are not directly referred to] in Chapter 21 of AR 27-10.

b. RC soldiers tried by SCM while on IDT must serve punishment during normal IDT periods.⁴³

c. Punishments unserved when RC soldiers are released from title 10 status are carried over to subsequent periods of title 10 status. An RC soldier may not be held beyond the end of a normal IDT period for punishment or trial, nor may IDT be scheduled solely for the purpose of UCMJ action⁴⁴ [including punishment].

d. Forfeitures will be calculated in whole dollar amounts based on the base pay for an AC soldier with the same grade and time in service,⁴⁵ [i.e., forfeiture of seven days pay (maximum forfeiture in a company grade article 15)⁴⁶ is forfeiture of pay an RC soldier would receive for 7 UTA's, not what he could receive for seven drill days (maximum of 14 UTA's). Chapter 21 does not further address forfeitures. However, in accordance with DOD directives,⁴⁷ chapter 3 of AR 27-10 specifies that a maximum of one-half the pay can be withheld in any one pay period.⁴⁸ Chapter 3 also specifies that forfeiture imposed by a company grade commander cannot be applied for more than one month, and by a field grade commander for not more than two months.⁴⁹ Since RC soldiers are paid monthly for IDT, it appears a maximum of pay for two UTA's could ordinarily be withheld in a company grade article 15, and for four UTA's in a field grade article 15 (i.e. pay for two UTAs forfeited for two months)].

IX. Support

a. The Staff Judge Advocate (SJA) of the AC command designated to support an RC command will supervise prosecution of RC soldiers. RC judge advocates may be used when feasible.⁵⁰ [Again, a MOU with the supporting GCMCA might be useful.]

b. The US Army Trial Defense Service will detail AC or RC defense counsel.⁵¹

c. The AC GCMCA will:

1. order RC soldiers to AD except where Secretarial approval is required;⁵²

2. forward requests for AD for Secretarial approval when such approval is requested or appropriate;⁵³

3. "coordinate the allocation of personnel, funds and other resources to support the administration of military justice in the supported RC command";⁵⁴

4. order pretrial confinement when appropriate if the involuntary order to AD has Secretarial approval;⁵⁵

5. arrange for AD orders for witnesses, counsel, judges and court members;⁵⁶

6. dispose of charges: referral to CM, imposing of NJP or administrative measures;⁵⁷

7. inform the MUSARC, CONUSA and/or OCONUS commanders of UCMJ actions involving their soldiers.⁵⁸

⁵³ *Id.* para. 21-12b.

⁵⁴ *Id.* para. 21-12c. Compare AR 27-10, para. 21-2d, "Costs associated with disciplining RC soldiers will be paid out of RC funds." Coordination of funds apparently does not imply the furnishing of those funds.

⁵⁵ *Id.* para. 21-12f.

⁵⁶ *Id.* para. 21-12h.

⁵⁷ *Id.* para. 21-12g.

⁵⁸ *Id.* para. 21-12d and e.

GRA Notes

Update to 1989 Academic Year On-Site Schedule

The following information updates the 1989 Academic Year Continuing Legal Education (On-Site) Training Schedule published in the July edition of *The Army Lawyer* at 76.

The location for the New York on-site scheduled for 19 and 20 November is Fordham University School of Law across from Lincoln Center in Manhattan. The host unit is the 77th ARCOM.

The Louisville on-site previously scheduled for 25 and 26 March 1989 has been rescheduled for 22 and 23 April 1989. All other information concerning this on-site remains the same.

The Atlanta on-site action officer is now Major Charles Parnell. His mailing address is 213th Military Law Center, 2385 Chamblee-Tucker Road, Chamblee, Georgia 30341-3499. The telephone number is (404) 452-4717.

The name and correct address of the San Antonio on-site action officer is Major Michael D. Bowles, 8400 Blanco Road, Suite 102, San Antonio, Texas 78216.

The on-site location for the Denver on-site is the Executive Tower Inn, 1405 Curtis Street, Denver, Colorado 80202.

Fifth Army is testing the implementation of subject matter on-sites this year at their on-sites. The following subjects will now be taught at the Fifth Army on-sites: Contract law at Kansas City; Administrative and Civil Law at San Antonio; and Criminal Law at New Orleans.

The address for the Washington, D.C. on-site action officer, CPT David LaCroix is now 7383 Jiri Woods Court, Springfield, Virginia 22153.

Physical Examinations

All members of the Army Reserve must comply with physical examination (PE) requirements prior to being placed on training orders. For tours of 30 days or less, a

physical within the last four years of the start date of the tour is required. For tours of more than 30 days, reservists must have a physical within 18 months of the date they will begin the tours. An IRR or IMA judge advocate will receive an order to take a new examination from ARPERCEN within 60-90 days before the expiration of their current physical examination. If the physical examination order is not received by that time, they should contact their JAGC Personnel Management Officer (PMO), (1-800-325-4916) or the Physical Evaluations Office (1-800-433-0521), ARPERCEN, to specifically request physical examination orders.

Troop Unit (TPU) members obtain their physical examinations through their unit. TPU members requesting active duty for training (ADT) or active duty for special work (ADSW) orders from ARPERCEN must include a statement of HIV clearance on their DA Form 1058-R before processing.

Physical examinations for reservists are conducted by USAR medical units, military installation medical facilities, military entrance processing stations (MEPS), and by private physicians. A private physician examination will only be authorized at government expense when the reservist is more than 90 miles from a military or governmental medical facility, and prior written approval is received from the Physical Evaluations Office, ARPERCEN. Orders issued by ARPERCEN to the reservist for a quadrennial or other physical will specify the location and the facility. It is important that reservists schedule their appearance with the designated medical facility in advance. Showing up for physical examinations unannounced will often result in disappointment and inconvenience.

To be acceptable, physical examinations must be submitted on SF 88 and 93 forms. It is essential that the medical facility complete the medical examination forms in their entirety. If the reservist has any problems in scheduling their exam, they should contact the Physical Evaluations Office, or their PMO. Most medical facilities will honor physical examination orders even past the expiration date.

FY 89 Annual Training Tours

FY 89 budget constraints have limited ARPERCEN's current funding of annual training tours to a 55 percent quota of IMA's assigned to the IMA organization. For JAGC activities other than OTJAG and its FOA's, the SJA or supervising JA should coordinate with the Director of Reserve Components Support (DRCS) assigned to the command to assure getting a proportionate share and to assist in making the best of this situation. For OTJAG and its FOA's, most of the 55 percent quota have already been requested. In any event, requests for orders (DA Form 2446) for FY 89 annual training tours should continue to be forwarded to ARPERCEN beyond the 55 percent limitation to facilitate processing in the event additional funds become available during the FY. That has often been the case in past years. IMA officers should contact their IMA organizations and the JAGC Personnel Management Officers (PMO's) at ARPERCEN (1-800-325-4916; 314-263-7665/7698) for current information on the status of their request for orders. This will help them plan for absences from their employment and adjust their efforts to achieve a "good" year for retirement (50 points).

Operating under a limited budget is not going to be easy and it's likely that everyone will not receive annual training

every year. Because funds are not available to train everyone who wants to train, the IMA organization and the IMA officer must be alert to ways to earn retirement points other than active duty. There are many ways to obtain additional retirement points other than active duty. Active duty is not required to make a "good" year. The IMA organization and the IMA officer are both responsible for initiating ways for the officer to do projects for retirement points. It is essential that each IMA be aware of the options available in order to earn at least 50 retirement points yearly.

ADT for CLE On-Site Training

JAGC officers assigned to an IMA position or to the IRR may apply for Active Duty for Training (ADT) to attend scheduled CLE on-site training in their area. Application is made by DA Form 1058 sent to ARPERCEN, ATTN: DARP-OPS-JA, 9700 Page Boulevard, St. Louis, MO 63132-5200. For further information call your JAGC Personnel Management Officer (PMO) at ARPERCEN: Major Arthur Kellum and Captain Paul Conrad (800-325-4916/314-263-7698). TPU members should apply to their unit for ADT orders.

CLE News

1. Resident Course Quotas

Attendance at resident CLE courses at The Judge Advocate General's School is restricted to those who have been allocated quotas. If you have not received a welcome letter or packet, you do not have a quota. Quota allocations are obtained from local training offices which receive them from the MACOM's. Reservists obtain quotas through their unit or ARPERCEN, ATTN: DARP-OPS-JA, 9700 Page Boulevard, St. Louis, MO 63132 if they are nonunit reservists. Army National Guard personnel request quotas through their units. The Judge Advocate General's School deals directly with MACOMs and other major agency training offices. To verify a quota, you must contact the Nonresident Instruction Branch, The Judge Advocate General's School, Army, Charlottesville, Virginia 22903-1781 (Telephone: AUTOVON 274-7110, extension 972-6307; commercial phone: (804) 972-6307).

2. TJAGSA CLE Course Schedule

1988

November 7-10: 2d Procurement Fraud Course (5F-F36).

November 14-18: 27th Fiscal Law Course (5F-F12).

November 28-December 2: 23rd Legal Assistance Course (5F-F23).

December 5-9: 4th Judge Advocate & Military Operations Seminar (5F-F47).

December 12-16: 34th Federal Labor Relations Course (5F-F22).

1989

January 9-13: 1989 Government Contract Law Symposium (5F-F11).

January 17-March 24: 118th Basic Course (5-27-C20).

January 30-February 3: 97th Senior Officers Legal Orientation (5F-F1).

February 6-10: 22d Criminal Trial Advocacy Course (5F-F32).

February 13-17: 2d Program Managers' Attorneys Course (5F-F19).

February 27-March 10: 117th Contract Attorneys Course (5F-F10).

March 13-17: 41st Law of War Workshop (5F-F42).

March 13-17: 13th Admin Law for Military Installations Course (5F-F24).

March 27-31: 24th Legal Assistance Course (5F-F23).

April 3-7: 5th Judge Advocate & Military Operations Seminar (5F-F47).

April 3-7: 4th Advanced Acquisition Course (5F-F17).

April 11-14: JA Reserve Component Workshop.

April 17-21: 98th Senior Officers Legal Orientation (5F-F1).

April 24-28: 7th Federal Litigation Course (5F-F29).

May 1-12: 118th Contract Attorneys Course (5F-F10).

May 15-19: 35th Federal Labor Relations Course (5F-F22).

May 22-26: 2d Advanced Installation Contracting Course (5F-F18).

May 22-June 9: 32d Military Judge Course (5F-F33).

June 5-9: 99th Senior Officers Legal Orientation (5F-F1).

June 12-16: 19th Staff Judge Advocate Course (5F-F52).

June 12-16: 5th SJA Spouses' Course.
 June 12-16: 28th Fiscal Law Course (5F-F12).
 June 19-30: JATT Team Training.
 June 19-30: JAOAC (Phase II).
 July 10-14: U.S. Army Claims Service Training Seminar.
 July 12-14: 20th Methods of Instruction Course.
 July 17-19: Professional Recruiting Training Seminar.
 July 17-21: 42d Law of War Workshop (5F-F42).
 July 24-August 4: 119th Contract Attorneys Course (5F-F10).
 July 24-September 27: 119th Basic Course (5-27-C20).
 July 31-May 18, 1990: 38th Graduate Course (5-27-C22).
 August 7-11: Chief Legal NCO/Senior Court Reporter Management Course (512-71D/71E/40/50).
 August 14-18: 13th Criminal Law New Developments Course (5F-F35).
 September 11-15: 7th Contract Claims, Litigation and Remedies Course (5F-F13).

3. Army Sponsored Continuing Legal Education Calendar (1 October 1988-30 September 1989)

The following is a schedule of Army Sponsored Continuing Legal Education, not conducted at TJAGSA. Those interested in the training should check with the sponsoring agency for quotas and attendance requirements. NOT ALL training listed is open to all JAG officers. Dates and locations are subject to change; check before making plans to attend. Sponsoring agencies are: OTJAG Legal Assistance, (202) 697-3170; TJAGSA On-Site, Guard & Reserve Affairs Department, (804) 972-6380; Trial Judiciary, (703) 756-1795; Trial Counsel Assistance Program (TCAP), (202) 756-1804; U.S. Army Trial Defense Service (TDS), (202) 756-1390; U.S. Army Claims Service, (301) 677-7804; Office of the Judge Advocate, U.S. Army Europe, & Seventh Army (POC: CPT Duncan, Heidelberg Military 8930). This schedule will be updated in *The Army Lawyer* on a periodic basis. Coordinator: MAJ Williams, TJAGSA, (804) 972-6342.

TRAINING	LOCATION	DATE
TJAGSA On-Site	Minneapolis, MN	1-2 Oct 1988
WESTPAC CLE Program	Korea	3-4 Oct 1988
USAREUR Criminal Law CLE I	Garmisch, Germany	9-14 Oct 1988
USAREUR Criminal Law Advocacy CLE	Garmisch, Germany	14-17 Oct 1988
USAREUR Criminal Law CLE II	Garmisch, Germany	(Trial Advocacy) 17-22 Oct 1988
TCAP Seminar	Fort Lewis, WA	12-13 Oct 1988
USAREUR International Law Trial Observer CLE	Heidelberg, Germany	20-21 Oct 1988
TJAGSA On-Site	Philadelphia, PA	22-23 Oct 1988
TJAGSA On-Site	Boston, MA	22-23 Oct 1988
USAREUR Contract Law—N.A.F. CLE	Heidelberg, Germany	26-28 Oct 1988
TJAGSA On-Site	St. Louis, MO	29-30 Oct 1988
Advanced Claims Workshop	Baltimore, MD	31 Oct-3 Nov 1988
TJAGSA On-Site	Detroit, MI	12 Nov 1988
TJAGSA On-Site	Indianapolis, IN	13 Nov 1988
TJAGSA On-Site	New York, NY	19-20 Nov 1988
Judge Advocates Management CLE	Berchtesgaden, Germany	21-23 Nov 1988
TCAP Seminar	Hawaii, Korea	Nov 1988
TDS Workshop (Region IV)	Austin, TX	Nov 1988
TDS Workshop (Region II)	Fort Benning, GA	Nov 1988
1st/2d Circuit Judicial Conference	TBA	Nov 1988
Interservice Trial Advocacy Seminar	Pearl Harbor, Hawaii	Nov 1988

USAREUR Claims Service CLE	Mannheim, Germany	5-9 Dec 1988
TDS Workshop (Region V)	Presidio, San Fran.	6-8 Dec 1988
USAREUR International Law Conference	Berlin, Germany	6-9 Dec 1988
TDS Workshop (Region I)	Fort Dix, NJ	Dec 1988
TCAP Seminar	San Antonio, TX	Dec 1988
TJAGSA On-Site	Los Angeles, CA	7-8 Jan 1989
USAREUR Legal Assistance and Income Tax CLE	Ramstein AFB, Germany	9-13 Jan 1989
USAREUR Administrative Law CLE	Heidelberg, Germany	17-20 Jan 1989
TJAGSA On-Site	Seattle, WA	28-29 Jan 1989
TCAP Seminar	Washington, D.C. (M.D.W.)	Jan 1989
TJAGSA On-Site	Atlanta, GA	11-12 Feb 1989
TJAGSA On-Site	Denver, CO	25-26 Feb 1989
TJAGSA On-Site	Washington, D.C.	25-26 Feb 1989
TCAP Seminar	Atlanta, GA	Feb 1989
3d/4th Circuits Judicial Conference	TBA	Feb 1989
TJAGSA On-Site	Columbia, SC	4-5 Mar 1989
TJAGSA On-Site	Kansas City, MO	11-12 Mar 1989
USAREUR Contract Law CLE	Heidelberg, Germany	13-17 Mar 1989
TJAGSA On-Site	San Antonio, TX	18-19 Mar 1989
TJAGSA On-Site	San Francisco, CA	18-19 Mar 1989
TDS Workshop (Region III)	Fort Leavenworth, KS	Mar 1989
TCAP Seminar	Kansas City, MO	Mar 1989
USAREUR Staff Judge Advocate CLE	Heidelberg, Germany	20-21 Apr 1989
TJAGSA On-Site	Louisville, KY	22-23 Apr 1989
TJAGSA On-Site	Chicago, IL	22-23 Apr 1989
TJAGSA On-Site	New Orleans, LA	29-30 Apr 1989
TCAP Seminar	USAREUR	Apr 1989
TJAGSA On-Site	Columbus, OH	6-7 May 1989
TJAGSA On-Site	Birmingham, AL	6-7 May 1989
TJAGSA On-Site	San Juan, PR	9-10 May 1989
USAREUR International Law Trial Observer CLE	Heidelberg, Germany	11-12 May 1989
USAREUR International Law—Operational Law CLE	Heidelberg, Germany	23-26 May 1989
TCAP Seminar	San Francisco, CA	May 1989
TCAP Seminar	Fort Hood, TX	June 1989
TCAP Seminar	West Point, NY	July 1989
USAREUR Contract Law—Procurement Fraud Advisor CLE	Heidelberg, Germany	18 Aug 1989
USAREUR Staff Judge Advocate CLE	Heidelberg, Germany	24-25 Aug 1989
TCAP Seminar	Fort Bragg, NC	Aug 1989
USAREUR Branch Office C.J.A. CLE	Heidelberg, Germany	Aug 1989
USAREUR Legal Assistance CLE	Garmisch, Germany	5-8 Sept 1989
TCAP Seminar	Fort Carson, CO	Sept 1989

4. Civilian Sponsored CLE Courses

January 1989

8-13: NJC, Advanced Judicial Writing, Orlando, FL.
 8-13: NJC, Search & Seizure, Orlando, FL.
 8-13: NJC, Sentencing Misdemeanants, Orlando, FL.
 12-13: PLI, Current Problems in Federal Civil Practice, Los Angeles, CA.
 12-13: PLI, Problems of Indenture Trustees and Bondholders, San Francisco, CA.
 12-13: PLI, Preparation of Annual Disclosure Documents, Chicago, IL.
 12-13: PLI, 28th Annual Advanced Antitrust, San Francisco, CA.
 12-13: PLI, Impact of Environmental Regulations on Business Transactions, Chicago, IL.

12-13: PLI, SEC and Tax Opinions/Business Opinions, New York, NY.

12-13: ALIABA, Broker-Dealer Regulation, Washington, D.C.

15-20: NJC, Advanced Evidence, Kirkwood, CA.

19: ALIABA, VLR: Bad Faith Insurance Litigation, Washington, D.C.

19-20: ALIABA, Products Liability, New Orleans, LA.

19-20: PLI, Technology Licensing, New York, NY.

20: PLI, Workshop on Legal Writing, Washington, D.C.

20-21: UKCL, Construction Law, Lexington, KY.

23-27: GCP, Contracting with the Government, Washington, D.C.

26-27: PLI, Preparation of Annual Disclosure Documents, New York, NY.

26-27: ABA, Joint Venturing Abroad, New York, NY.

27: PLI, Workshop on Legal Writing, Los Angeles, CA.

30/2-3: ESI, Federal Contracting Basics, Washington, D.C.

For further information on civilian courses, please contact the institution offering the course. The addresses are listed in the August 1988 issue of *The Army Lawyer*.

5. Mandatory Continuing Legal Education Jurisdictions and Reporting Dates

<i>Jurisdiction</i>	<i>Reporting Month</i>
Alabama	31 December annually
Colorado	31 January annually
Delaware	On or before 31 July annually every other year
Florida	Assigned monthly deadlines every three years beginning in 1989

Georgia
Idaho

31 January annually
1 March every third anniversary of admission

Indiana

1 October annually

Iowa

1 March annually

Kansas

1 July annually

Kentucky

30 days following completion of course

Louisiana

31 January annually beginning in 1989

Minnesota

30 June every third year

Mississippi

31 December annually

Missouri

30 June annually beginning in 1988

Montana

1 April annually

Nevada

15 January annually

New Mexico

1 January annually or 1 year after admission to Bar beginning in 1988

North Carolina

12 hours annually

North Dakota

1 February in three-year intervals

Oklahoma

1 April annually

Oregon

Beginning 1 January 1988 in three-year intervals

South Carolina

10 January annually

Tennessee

31 January annually

Texas

Birth month annually

Vermont

1 June every other year

Virginia

30 June annually

Washington

31 January annually

West Virginia

30 June annually

Wisconsin

31 December in even or odd years depending on admission

Wyoming

1 March annually

For addresses and detailed information, see the July 1988 issue of *The Army Lawyer*.

Current Material of Interest

1. TJAGSA Materials Available Through Defense Technical Information Center

Each year, TJAGSA publishes deskbooks and materials to support resident instruction. Much of this material is useful to judge advocates and government civilian attorneys who are not able to attend courses in their practice areas. The School receives many requests each year for these materials. Because such distribution is not within the School's mission, TJAGSA does not have the resources to provide these publications.

In order to provide another avenue of availability, some of this material is being made available through the Defense Technical Information Center (DTIC). There are two ways an office may obtain this material. The first is to get it through a user library on the installation. Most technical and school libraries are DTIC "users." If they are "school" libraries, they may be free users. The second way is for the office or organization to become a government user. Government agency users pay five dollars per hard copy for reports of 1-100 pages and seven cents for each additional page over 100, or ninety-five cents per fiche copy. Overseas users may obtain one copy of a report at no charge. The necessary information and forms to become registered as a

user may be requested from: Defense Technical Information Center, Cameron Station, Alexandria, VA 22314-6145, telephone (202) 274-7633, AUTOVON 284-7633.

Once registered, an office or other organization may open a deposit account with the National Technical Information Service to facilitate ordering materials. Information concerning this procedure will be provided when a request for user status is submitted.

Users are provided biweekly and cumulative indices. These indices are classified as a single confidential document and mailed only to those DTIC users whose organizations have a facility clearance. This will not affect the ability of organizations to become DTIC users, nor will it affect the ordering of TJAGSA publications through DTIC. All TJAGSA publications are unclassified and the relevant ordering information, such as DTIC numbers and titles, will be published in *The Army Lawyer*.

The following TJAGSA publications are available through DTIC. The nine character identifier beginning with the letters AD are numbers assigned by DTIC and must be used when ordering publications.

Contract Law

- AD B112101 Contract Law, Government Contract Law Deskbook Vol 1/ JAGS-ADK-87-1 (302 pgs).
- AD B112163 Contract Law, Government Contract Law Deskbook Vol 2/ JAGS-ADK-87-2 (214 pgs).
- AD B100234 Fiscal Law Deskbook/JAGS-ADK-86-2 (244 pgs).
- AD B100211 Contract Law Seminar Problems/JAGS-ADK-86-1 (65 pgs).

Legal Assistance

- AD A174511 Administrative and Civil Law, All States Guide to Garnishment Laws & Procedures/JAGS-ADA-86-10 (253 pgs).
- AD B116100 Legal Assistance Consumer Law Guide/JAGS-ADA-87-13 (614 pgs).
- AD B116101 Legal Assistance Wills Guide/JAGS-ADA-87-12 (339 pgs).
- AD B116102 Legal Assistance Office Administration Guide/JAGS-ADA-87-11 (249 pgs).
- AD B116097 Legal Assistance Real Property Guide/JAGS-ADA-87-14 (414 pgs).
- AD A174549 All States Marriage & Divorce Guide/JAGS-ADA-84-3 (208 pgs).
- AD B089092 All States Guide to State Notarial Laws/JAGS-ADA-85-2 (56 pgs).
- AD B093771 All States Law Summary, Vol I/JAGS-ADA-87-5 (467 pgs).
- AD B094235 All States Law Summary, Vol II/JAGS-ADA-87-6 (417 pgs).
- AD B114054 All States Law Summary, Vol III/JAGS-ADA-87-7 (450 pgs).
- AD B090988 Legal Assistance Deskbook, Vol I/JAGS-ADA-85-3 (760 pgs).
- AD B090989 Legal Assistance Deskbook, Vol II/JAGS-ADA-85-4 (590 pgs).
- AD B092128 USAREUR Legal Assistance Handbook/JAGS-ADA-85-5 (315 pgs).
- AD B095857 Proactive Law Materials/JAGS-ADA-85-9 (226 pgs).
- AD B116103 Legal Assistance Preventive Law Series/JAGS-ADA-87-10 (205 pgs).
- AD B116099 Legal Assistance Tax Information Series/JAGS-ADA-87-9 (121 pgs).

Claims

- AD B108054 Claims Programmed Text/JAGS-ADA-87-2 (119 pgs).

Administrative and Civil Law

- AD B087842 Environmental Law/JAGS-ADA-84-5 (176 pgs).
- AD B087849 AR 15-6 Investigations: Programmed Instruction/JAGS-ADA-86-4 (40 pgs).
- AD B087848 Military Aid to Law Enforcement/JAGS-ADA-81-7 (76 pgs).
- AD B100235 Government Information Practices/JAGS-ADA-86-2 (345 pgs).
- AD B100251 Law of Military Installations/JAGS-ADA-86-1 (298 pgs).

- AD B108016 Defensive Federal Litigation/JAGS-ADA-87-1 (377 pgs).
- AD B107990 Reports of Survey and Line of Duty Determination/JAGS-ADA-87-3 (110 pgs).
- AD B100675 Practical Exercises in Administrative and Civil Law and Management/JAGS-ADA-86-9 (146 pgs).

Labor Law

- AD B087845 Law of Federal Employment/JAGS-ADA-84-11 (339 pgs).
- AD B087846 Law of Federal Labor-Management Relations/JAGS-ADA-84-12 (321 pgs).

Developments, Doctrine & Literature

- AD B086999 Operational Law Handbook/JAGS-DD-84-1 (55 pgs).
- AD B124193 Military Citation/JAGS-DD-88-2 (38 pgs).

Criminal Law

- AD B095869 Criminal Law: Nonjudicial Punishment, Confinement & Corrections, Crimes & Defenses/JAGS-ADC-85-3 (216 pgs).
- AD B100212 Reserve Component Criminal Law PEs/JAGS-ADC-86-1 (88 pgs).

The following CID publication is also available through DTIC:

- AD A145966 USACIDC Pam 195-8, Criminal Investigations, Violation of the USC in Economic Crime Investigations (250 pgs).

Those ordering publications are reminded that they are for government use only.

2. Regulations & Pamphlets

Listed below are new publications and changes to existing publications.

Number	Title	Change	Date
AR 11-37	Army Finance and Accounting Quality Assurance Program		29 Aug 88
AR 60-21	Exchange Service Personnel Policies	101	2 Jul 88
AR 70-25	Use of Volunteers as Subjects of Research		8 Aug 88
AR 70-59	Department of Defense Tactical Shelter Program		29 Jul 88
AR 71-13	The Department of the Army Equipment Authorization and Usage Program		3 Jun 88
AR 190-5	Motor Vehicle Traffic Supervision		8 Jul 88
AR 310-1	Military Publications, Blank Forms, and Printings Management	101	21 Jul 88
AR 380-10	Disclosure of Information and Visits and Accreditation of Foreign Nationals		29 Jul 88
AR 635-100	Personnel Separations	102	2 Jul 88

AR 635-120	Personnel Separations—Officer Resignations and Discharges	101	21 Jul 88
CIR 11-86-1 thru 3	Internal Control Review Checklists	101	22 Aug 88
CIR 11-88-3	Internal Control Review Checklists		1 Aug 88
CIR 11-88-4	Internal Control Review Checklists		2 Aug 88
CIR 11-88-5	Internal Control Review Checklists		3 Aug 88
Pam 351-20	Army Correspondence Course Program Catalog		22 Jul 88
UPDATE	Finance UPDATE	11	10 Aug 88

3. The following civilian law review articles may be of use to judge advocates in performing their duties.

Aspen, *Some Thoughts on the Historical Origins of the United States Constitution and the Establishment Clause*, 21 J. Mar. L. Rev. 239 (1988).

Bell, *The Constitution at 200: Reflections on the Past-Implications for the Future*, 5 N.Y.L.S. J. Hum. Rts. 331 (1988).

Coffin, *Judicial Balancing: The Protean Scales of Justice*, 63 N.Y.U. L. Rev. 16 (1988).

Currie, *The Constitution in the Supreme Court: Civil Rights and Liberties, 1930-1941*, 1987 Duke L.J. 800 (1987).

Erwin, *Alienated Justice: Rethinking Justiciability on the Occasion of the Bicentennial of the U.S. Constitution*, 22 New Eng. L. Rev. 561 (1988).

Hall, *The Constitution and Race: A Critical Perspective*, 5 N.Y.L.S. J. Hum. Rts. 229 (1988).

Reid, *The Rehnquist Court and Constitutional Interpretation*, 30 How. L.J. 1189 (1987).

Reynolds, *Constitutional Education*, 1987 B.Y.U. L. Rev. 1023 (1987).

Rotunda, *Bicentennial Lessons From the Constitutional Convention of 1787*, 21 Suffolk U.L. Rev. 589 (1987).

Sherry, *Two Hundred Years Ago Today*, 6 Law & Inequality 43 (1988).

Weinberg, *The Place of Trial and the Law Applied: Overhauling Constitutional Theory*, 59 U. Colo. L. Rev. 67 (1988).

Wilson, *The Making of a Constitution*, 71 Judicature 334 (1988).



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By Order of the Secretary of the Army:

CARL E. VUONO
General, United States Army
Chief of Staff

Official:

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Brigadier General, United States Army
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